Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

JOHN D. NORDSTROM,

Petitioner,

v.

AARON M. WEULE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE NINTH CIRCUIT COURT OF APPEALS FAILED TO FOLLOW THIS COURT'S RULING IN *KAWAAUHAU V. GEIGER* WHEN IT RULED THAT THE WILLFUL INJURY REQUIREMENT OF 11 U.S.C. § 523(a)(6) IS MET WHEN IT IS SHOWN EITHER THAT THE DEBTOR HAD A SUBJECTIVE MOTIVE TO INFLICT INJURY OR THAT THE DEBTOR BELIEVED THAT INJURY WAS SUBSTANTIALLY CERTAIN TO OCCUR AS A RESULT OF HIS OR HER CONDUCT.

II. WHETHER THE APPLICATION OF THE NINTH CIRCUIT COURT OF APPEALS RULING INAPPROPRIATELY EXPOSES DEBTORS TO POTENTIAL ALTER EGO LIABILITY IN DEROGATION OF THE AUTOMATIC STAY PROVIDED UNDER 11 U.S.C. § 362.

LIST OF PARTIES

1. John D. Nordstrom
2. Aaron M. Weule

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PETITION FOR WRIT OF CERTIORARI

Petitioner, John D. Nordstrom ("Nordstrom" or "Petitioner"), respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals in and for the Ninth Circuit, entered on May 7, 2001, in the above entitled proceeding.

OPINIONS BELOW

Aaron M. Weule v. John Nordstrom (In re John Nordstrom and Lois M. Nordstrom), Unpublished Opinion, United States Court of Appeals for the Ninth Circuit, filed May 7, 2001, reprinted in the Appendix. (App. 1-14).

Aaron M. Weule v. John D. Nordstrom (In re John Nordstrom and Lois M. Nordstrom), Unpublished Opinion, United States Bankruptcy Appellate Panel for the Ninth Circuit Court of Appeals, filed February 19, 1999, reprinted in the Appendix. (App. 15-33).

Aaron M. Weule v. John Nordstrom, Unpublished Opinion, United States Bankruptcy Court in and for the Southern District of California filed August 25, 1997, reprinted in the Appendix. (App. 34-42).

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals in and for the Ninth Circuit was entered on May 7, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 523(a)(6)

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

. . .

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity. . . .

11 U.S.C. § 362(a)(1)

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of –

(1) the commencement or continuation, including the issuance or employment of process, or a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title. . . .

STATEMENT OF THE CASE

Nordstrom was involved in the ownership and operation of two related entities, International Insurance Underwriters, Inc. ("IIU") and International Insurance Underwriters of Washington, Inc. ("IIUW") from 1990 to 1993. (App. 1-2). IIU was a licensed insurance broker in

the State of California. (App. 2). IIUW was the managing general agent of several alien insurance companies not admitted in California, but nevertheless selling automobile insurance in the state. (App. 2).

Weule was not a policy holder through IIUW or IIU. On January 25, 1992, Weule was injured in an automobile accident in Oakland, California. (App. 2). The driver of the other automobile, Rene Moscoso ("Moscoso"), however had obtained insurance coverage from Kingham Atlantic National Insurance Company, ("KAN"), a company incorporated in the British Virgin Islands. (App. 2). The policy limits of the insurance were $35,000 for each accident. KAN sold insurance in California through IIUW, its managing general agent. (App. 2).

Weule sued Moscoso in state court for negligence, and on March 4, 1993, obtained a default judgment against Moscoso for approximately $45,000. (App. 2). Arguably, $35,000 of this would have been covered under the policy. In connection with his efforts to recover the judgment from Moscoso's insurance policy, Weule discovered that KAN was insolvent. (App. 2).

On October 22, 1993, Weule filed a state court complaint against Nordstrom and his related entities, IIU and IIUW. (App. 2). Weule alleged that Nordstrom had intentionally engaged in a fraudulent scheme to sell underfunded insurance policies in violation of California law, and, as a result, Nordstrom and IIU and IIUW were liable to Weule for the damages suffered by him in the 1992 car accident. (App. 2). Several years later, on January 28, 1997, Nordstrom filed for protection under Chapter 7 of the United States Bankruptcy Code. (App. 2). As a result

of the stay imposed by 11 U.S.C. § 362, the complaint against Nordstrom was severed from the state court action. (App. 2).

Thereafter, the state court action continued undefended, and on April 9, 1997, a default judgment was entered in favor of Weule against IIU and IIUW. (App. 2). The state court found in the default proceeding that these companies had violated the California Insurance Code by fraudulently marketing insurance policies from undercapitalized, non-admitted insurance companies and by intentionally failing to notify the insured of non-renewal of his policy. (App. 2). The state court held that IIU and IIUW were jointly and severally liable to Weule for $32,500 in compensatory damages, $500,000 in punitive damages, and $85,000 for attorneys' fees and prejudgment interest and costs. (App. 2-3).

Weule filed an adversary proceeding against Nordstrom in Bankruptcy Court, alleging that his state court judgment was not dischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A), (a)(4), and (a)(6)[1]. (App. 3). Upon Nordstrom's motion, the Bankruptcy Court dismissed Weule's claim under §§ 523(a)(2)(A), (a)(4) for failure to state a claim upon which relief could be granted. (App. 3). Subsequently, a short bench trial was held to resolve the § (a)(6) claim. After the bench trial, the Bankruptcy Court dismissed Weule's remaining claim for non-dischargeability under § 523(a)(6). (App. 3, 42). Weule appealed the decisions of the Bankruptcy Court to the

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[1] References to "chapter", "§ " or "code" are to the Bankruptcy Code, 11 U.S.C. § et seq. unless otherwise indicated.

Bankruptcy Appellate Panel for the Ninth Circuit ("BAP"), which issued a memoranda affirming the Bankruptcy Court. (App. 15-33).

The BAP decision was appealed to the Ninth Circuit Court of Appeals which reversed and remanded. (App. 14). The Ninth Circuit held that the Bankruptcy Court erred by excluding copies of income tax returns produced by Nordstrom and in its interpretation of *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). The Ninth Circuit remanded to the BAP to remand to the Bankruptcy Court to determine whether, if the tax returns are taken into account, Nordstrom can be found to be the alter-ego of IIU and IIUW. (App. 12-13). While also holding that the state Court judgment could not be used for collateral estoppel purposes, the Ninth Circuit went on to hold inconsistently therewith that if the Bankruptcy Court decides that Nordstrom was the alter-ego, Weule's state court judgment should be found to be non-dischargeable under § 523(a)(6). (App. 14).

In support of its ruling, the Ninth Circuit set forth the standard of intent necessary to establish the "willful injury" requirement of § 523(a)(6) as follows:

> [U]nder *Geiger*, the willful injury requirement of § 523(a)(6) is met when it is shown either that the Debtor had a subjective motive to inflict the injury *or* that the Debtor believed that injury was substantially certain to occur as a result of his conduct.

(App. 13).

The Court held that the record made it clear that Nordstrom was at least "substantially certain" that his

allegedly fraudulent activities would cause injury, not only to the motorists covered under the policies issued, but also to Weule, a third party who might be injured by the intended insured motorist. (App. 13). The Court held that the BAP and the Bankruptcy Court erred insofar as they held that subjective intent to injure third-party Weule was required to establish a claim under § 523(a)(6). (App. 14).

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS' DECISION CONFLICTS WITH A RECENT U.S. SUPREME COURT DECISION.

In 1998 this Court held in *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), that only acts done with actual intent to cause injury are not subject to discharge pursuant to the requirement for willful and malicious injury pursuant to § 523(a)(6). The Ninth Circuit Court of Appeals failed to follow the *Geiger* ruling by interpreting the test for determining nondischargeability under § 523(a)(6) in an erroneously broad manner.

The *Geiger* Court held that a debt arising from a medical malpractice judgment attributable to negligence or reckless conduct does not fall within § 523(a)(6). *Geiger*, 523 U.S. at 59. In issuing its decision, this Court upheld the Eighth Circuit's reading of § 523(a)(6) that only acts done with actual intent to cause injury fall within the scope of the exception. *Id.* at 61-62. The Court

held that the statute supported the Eighth Circuit's reading as follows:

> The word "willful" in (a)(6) modifies the word "injury," indicating that nondischargeability takes deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury." Or, Congress might have selected an additional word or words, i.e., "reckless" or "negligent," to modify "injury." Moreover, as the Eighth Circuit observed, the (a)(6) formulation triggers in the lawyer's mind the category "intentional torts," as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intended "the consequences of the act," not simply "the act itself."

Id.

This Court went on to explain that the Plaintiff's interpretation of the willful requirement of § 523(a)(6) potentially placed within the willful category a wide range of situations in which an act is intentional, but injury is unintended, *i.e.*, neither desired nor in fact anticipated by the debtor. *Id.* at 62. However, the Court held that a construction so broad would be incompatible with the well known guide that exceptions to discharge should be confined to those plainly expressed. *Id.* at 62.

In the case at hand, the Ninth Circuit cites to a recent opinion from that Court, *Petralia v. Jercich (In re George Jercich)*, 238 F.3d 1202 (9th Cir. 2001), *petition for cert. filed* (U.S. Apr. 23, 2001) (No. 00-1632), wherein it sets forth

the Ninth Circuit standard of the "willful injury" requirement of § 523(a)(6). (App. 13). Upon careful analysis it is evident that the Ninth Circuit failed to follow this Court's *Geiger* decision by setting forth a standard which thwarts Congressional intent as set forth in § 523(a)(6).

In the case at hand, the Ninth Circuit held that the willfulness prong of § 523(a)(6) does not require specific intent to injure, despite the fact that the *Geiger* court expressly stated that "nondischargeability takes deliberate or intentional injury." (App. 13-14); *Geiger*, 523 U.S. at 61. The Ninth Circuit in *Jercich*, relied on post-*Geiger* decisions of the Fifth and Sixth Circuits, as well as the Ninth Circuit BAP, to support its holding that under *Geiger*, the willful injury requirement of § 523(a)(6) can be satisfied by showing that the Debtor believed that injury was substantially certain to occur as a result of his conduct. *Jercich*, 238 F. 3d at 1208; (App. 13).

The Ninth Circuit further held that the record was clear that Nordstrom was at least "substantially certain" that his fraudulent activities would cause injury not only to motorists covered under the policies issued, but also to third parties who were injured by the motorist, and that these facts fall within the "*Geiger-Jercich*" standard of intent. (App. 13). The Ninth Circuit held that the BAP and the Bankruptcy Court erred insofar as they held that subjective intent to injure Weule was required. (App. 14).

The Ninth Circuit's ruling in this case and in *Jercich*, is incongruous with the Supreme Court's ruling in *Geiger*. In *Geiger*, the Supreme Court explicitly stated that nondischargeability takes deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.

Geiger, 523 U.S. at 61. As such, an actor must subjectively intend the consequences or injury resulting from act, rather than just the act itself. The Ninth Circuit, on the other hand, held in this case and several other recent Ninth Circuit cases that the willful injury requirement of § 523(a)(6) is met when it is shown "either that the Debtor had a subjective motive to inflict the injury *or* that the Debtor believed that injury was substantially certain to occur as a result of his conduct." (App. 13); *see also Jercich*, 238 F.3d at 1208.

The difference in this interpretation is drastic in light of the case at hand. Under *Geiger*, even if Nordstrom is found to be the alter ego of IIU and IIUW, there is no showing that any actions taken in connection with an alleged insurance sales scheme were intended to harm Weule, a removed third party, as opposed to the insurance company's customers, such as Moscoso. Weule failed to prove that Nordstrom subjectively intended to harm or injure Weule as required by *Geiger*, as Weule was too far removed from any wrongdoing on the part of Nordstrom. When the companies owned and operated by Nordstrom sold an insurance policy to Moscoso, it was not foreseeable that Moscoso would be involved in an automobile accident, or that injury to Moscoso or to a third party would result from said accident. Despite the same, the Ninth Circuit held that Nordstrom, as an owner and operator of IIU and IIUW, was at least "substantially certain" that his actions would cause injury not only to the company's insureds, but also to third parties who were injured by the insureds. (App. 13). The Court further stated that these facts establish willfulness under

§ 523(a)(6), despite the fact that there was no subjective intent to injure Weule, a remote third party.

Further, the Ninth Circuit has employed its broad test in cases other than the case at hand. About the time the Ninth Circuit heard this case, it decided several other cases using the same erroneous standard. At least one of these cases is before this Court on application for Certiorari. *See Petralia v. Jercich (In re George Jercich)*, 238 F.3d 1202 (9th Cir. 2001), *petition for cert. filed* (U.S. Apr. 23, 2001) (No. 00-1632). Moreover, the Ninth Circuit's interpretation already appears to be favoring nondischargeablility under § 523(a)(6) for judgments resulting from injuries which appear to be unintentional. *See Louis C. Su v. Dora Carrillo (In re Louis C. Su)*, 259 B.R. 909 (9th Cir. BAP 2001) (remanding to determine whether judgment obtained as a result of an automobile accident may possibly be considered nondischargeable under § 523(a)(6)).

The Ninth Circuit's interpretation is improperly broad and fails to further bankruptcy law's fundamental policy of granting discharge to the honest but unfortunate debtor. This petition must be granted to provide the correct standard for the courts below. It is imperative that this Court issue its ruling correcting the Ninth Circuit's improperly broad interpretation of the "willful" standard of § 523(a)(6). The Ninth Circuit's interpretation thwarts Congressional intent as set forth by the Court in *Geiger*. The question of what constitutes intent under § 523(a)(6) is one of national importance as it fundamentally alters requirements necessary for discharge and the bankruptcy laws of this country in general, and therefore, Nordstrom requests that the Court grant this Petition.

II.

THE COURTS OF APPEAL ARE SPLIT ON THEIR INTERPRETATION AND IMPLEMENTATION OF THIS COURT'S RULING IN *GEIGER*

The Courts of Appeal are split on the issue of the intent required to satisfy the "willful" requirement of § 523(a)(6). As shown heretofore, the Ninth Circuit test requiring subjective motive to inflict the injury or debtor's belief that injury is substantially certain to occur as a result of the debtor's conduct, is in conflict with the *Geiger* ruling. (App. 13); *Jercich*, 238 F.3d at 1208. In so holding, the Ninth Circuit analyzed *Miller v. J.D. Abrams, Incorporated (In re Miller)*, 156 F.3d 598 (5th Cir. 1998) and *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455 (6th Cir. 1999), and stated that the Ninth Circuit's standard was consistent with the approaches taken by the Fifth and Sixth Circuits. *Jercich*, 238 F.3d at 1208.

However, there is confusion among the Circuits which have attempted to apply the *Geiger* test. As pointed out by the Bankruptcy Appellate Panel for the Ninth Circuit in the case of *Louis C. Su v. Dora Carrillo (In re Louis C. Su)*, 259 B.R. 909 (9th Cir. BAP 2001), there is a material difference between the Fifth and Sixth Circuit tests. In *Miller*, the Fifth Circuit held that an "intentional tort requires either objective substantial certainty of harm, or subjective motive to do harm." *Miller*, 156 F.3d at 604. In *Jercich*, the Ninth Circuit interpreted the *Miller* test as requiring a showing that "the debtor's motive was to inflict the injury or the debtor's act was substantially certain to result in injury." *Jercich*, 238 F.3d at 1208. In *Markowitz*, the Sixth Circuit held that a willful injury

under § 523(a)(6) requires that "the actor desires to cause consequences of this act, or . . . believes that the consequences are substantially certain to result from it." *Markowitz*, 190 F.3d at 464. In *Jercich*, the Court interpreted the *Markowitz* test as requiring a showing that the debtor willed or desired the harm, or believed that injury was substantially certain to occur as a result of his behavior. *Jercich*, 238 F.3d at 1208. As such, the difference between the *Miller* and *Markowitz* holdings is that *Markowitz* required that the debtor believes that his or her actions will, with substantial certainty, cause injury, while in *Miller* the subjective belief of the debtor as to the certainty of harm is not controlling. A number of courts have failed to recognize this distinction and there is confusion regarding which standard to follow. *See e.g., Gonzalez v. Moffitt (In re Moffitt)*, 252 B.R. 916, 922 (6th Cir. BAP 2000) (stating that the Eighth and Fifth Circuits and the Ninth Circuit BAP have embraced the "substantially certain" standard); *see also Jercich*, 238 F.3d at 1208; *Baldwin v. Kilpatric (In re Baldwin)*, 245 B.R. 131 (9th Cir. BAP 2000).

Based on the foregoing, there is confusion at the Court of Appeals level regarding the standard of intent is necessary to satisfy § 523(a)(6), and, therefore, this petition must be granted to set forth the correct standard on this fundamental bankruptcy law issue.

III.

THE NINTH CIRCUIT'S OPINION IS FUNDAMENTALLY INCONSISTENT AND DEPARTS DRASTICALLY FROM THE ACCEPTED AND USUAL COURSE OF BANKRUPTCY PROCEEDINGS.

The Ninth Circuit's decision in this case is internally inconsistent and contrary to fundamental bankruptcy principles. The Ninth Circuit upheld the BAP and Bankruptcy Court decisions holding that the April 9, 1997 judgment obtained by Weule in his state civil suit had no collateral estoppel effect on his adversary proceeding against Nordstrom because Nordstrom was no longer a defendant in the litigation when the judgment was issued. (App. 5).

The Ninth Circuit further held that the Bankruptcy Court's decision to exclude income tax returns produced by Nordstrom was an abuse of discretion and the BAP erred in affirming the exclusion. (App. 9-10). The Ninth Circuit held that the tax documents tend to show that the Bankruptcy Court should have pierced the corporate veil, but that the record before it was not adequately developed to allow it to rule definitively on the alter ego issue. (App. 12). Therefore, the Court remanded to the BAP to remand to the Bankruptcy Court to decide whether IIU and IIUW were the alter egos of Nordstrom. (App. 12-13). The Court in a footnote stated that if Nordstrom is found to be the alter ego of IIU and IIUW, it may affect the collateral estoppel analysis set forth above, as the Court assumed that Nordstrom is not the alter ego of the companies for its collateral estoppel analysis. (App. 5).

However, this analysis conflicts with fundamental principles of bankruptcy law in that pursuant to 11 U.S.C. § 362, the automatic stay, absent obtaining relief from stay to proceed in the state court, would have prohibited the entry of a post bankruptcy judgment against Nordstrom. Nordstrom filed bankruptcy on January 28, 1997, and at that time, § 362 stayed any judicial actions against him as the debtor. On April 9, 1997, default judgment was entered in favor of Weule against IIU and IIUW for $32,500 in compensatory damages, $85,000 for attorneys' fees and prejudgment interest and costs, and $500,000 in punitive damages. (App. 2-3). This default judgment cannot be given collateral estoppel effect even if alter ego liability is found due to the fact that the state court judgment was entered against IIU and IIUW after Nordstrom filed for bankruptcy protection, and therefore, such judgment would be held to be void. *See Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940). Furthermore, no relief from stay was sought by Weule, and Nordstrom was severed from the state court action by Weule.

The Ninth Circuit's ruling is thus contrary to principles of bankruptcy law and will create confusion at the lower bankruptcy court level. If given its practical effect, debtors would need to defend any state court suits post bankruptcy where they are listed as a possible alter ego defendant to avoid a negative collateral estoppel effect. Debtors would need to do this even though no relief from stay had been granted. Therefore, Nordstrom requests that the Court grant this petition to set forth an analysis

which is congruent with current fundamental bankruptcy principles.

CONCLUSION

Based on the foregoing, Nordstrom respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully Submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE: JOHN NORDSTROM & LOIS M. NORDSTROM, Debtors.	No. 99-55843
	B.A.P. No. SC-98-01506-JoRyGr
AARON M. WEULE, Appellant, v. JOHN NORDSTROM, Appellee.	MEMORANDUM*
	(Filed May 07, 2001)

Appeal from the Bankruptcy Appellate Panel
Jones, Ryan, and Greenwald, Bankruptcy
Judges, Presiding.

Argued and Submitted Nov. 1, 2000.
San Francisco, California

Before: B. FLETCHER, O'SCANNLAIN, and GOULD, Circuit Judges.

John D. Nordstrom ("Nordstrom") owned and operated two related entities, International Insurance Underwriters, Inc. ("IIU") and International Insurance

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Underwriters of Washington, Inc. ("IIUW"). IIU was a licensed insurance broker in the State of California. IIUW was the managing general agent of several alien insurance companies not admitted in California but nevertheless selling automobile insurance in the state.

Aaron Weule ("Weule") was injured in an automobile accident in Oakland, California. The driver of the other automobile, Mr. Moscoso ("Moscoso"), had purchased an insurance policy from Kingham Atlantic National Insurance Company ("KAN"), a company incorporated in the British Virgin Islands. KAN sold insurance in California through IIUW, its managing general agent.

Weule sued Moscoso in California state court for negligence, and obtained a default judgment of approximately $45,000. In trying to recover the judgment from Moscoso and his insurance carrier, Weule discovered that KAN was insolvent. Weule filed a state court complaint against Nordstrom, IIU, and IIUW, alleging that Nordstrom had intentionally engaged in a fraudulent scheme to sell underfunded insurance policies in violation of California law.

Several years later, but during the continued pendency of the state case, Nordstrom filed for bankruptcy protection under Chapter 7. In response, Weule severed him from the state court action. A default judgment was subsequently entered in state court in favor of Weule against IIU and IIUW. The state court found that these companies had violated the California Insurance Code by, among other things, fraudulently marketing insurance policies from undercapitalized, non-admitted insurance companies. The state court found that IIU and IIUW were

liable to Weule for $32,500 in compensatory damages, $85,000 in attorneys' fees, and interest and costs. Additionally the state court found that IIU and IIUW were liable for $500,000 in punitive damages.

Weule filed this adversary proceeding against Nordstrom in bankruptcy court, alleging that his state court judgment was not dischargeable pursuant to §§ 523(a)(2)(A), (a)(4), and (a)(6).[1] Upon Nordstrom's motion, the bankruptcy court dismissed Weule's claims under §§ 523(a)(2)(A) and (a)(4) for failure to state a claim upon which relief could be granted. Subsequently, a short bench trial was held to resolve the (a)(6) claim. At about the same time, the U.S. Attorney brought criminal proceedings against Nordstrom for conspiracy to defraud.

After the bench trial, the bankruptcy court dismissed Weule's remaining claim for nondischargeability under § 532(a)(6), and a few days later, Nordstrom pled guilty to the criminal charges. In light of this development, Weule made a motion to the bankruptcy court for reconsideration that was denied. Weule appealed the decisions of the bankruptcy court to the Bankruptcy Appellate Panel ("BAP"), which issued a Memorandum affirming the bankruptcy court.

We review de novo a decision of the BAP. *United States Internal Revenue Serv. v. Palmer (In re Palmer)*, 207 F.3d 566, 567 (9th Cir. 2000). This court applies the same standard of review as did the BAP to the underlying

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[1] References to "chapter", "section", "§ ", or "code" are to the Bankruptcy Code, 11 U.S.C. § et. seq. unless otherwise indicated.

judgment of the Bankruptcy Court. *Lewis v. Scott (In re Lewis)*, 97 F.3d 1182, 1185 (9th Cir. 1996). We review the availability of collateral estoppel de novo. *In re Palmer*, 207 F.3d at 567-68. Whether a claim is nondischargeable is a mixed question of law and fact reviewed de novo. *Murray v. Bammer (In re Bammer)*, 131 F.3d 788, 792 (9th Cir. 1997) (en banc).

I. Collateral Estoppel

Weule argues that three earlier decisions by various California courts should have been given preclusive, collateral estoppel effect in the bankruptcy court. Principles of collateral estoppel apply in dischargeability proceedings. *See Grogan v. Garner*, 498 U.S. 279, 284 n. 11, (1991). Because the previous rulings occurred in state court, we apply California's collateral estoppel rules. *First Nat'l Bank v. Russell (In re Russell)*, 76 F.3d 242, 244 (9th Cir. 1996).

Under California law, [a] party is collaterally estopped from relitigating

> an issue previously adjudicated if: (1) the issue necessarily decided in the previous suit is identical to the issue sought to be relitigated; (2) there was a final judgment on the merits of the previous suit; and (3) the party against whom the estoppel is asserted was a party, or in privity with a party, to the previous suit.

In re Russell, 76 F.3d at 244-45 (internal quotation marks deleted) (quoting *In re Joshua J.*, 46 Cal. Rptr. 2d 491, 497 (Ct. App. 1995)).

A. State Civil Suit

We agree with the BAP and the bankruptcy court that the April 9, 1997 judgment in Weule's state civil suit has no collateral estoppel effect on his adversary proceeding against Nordstrom because Nordstrom was no longer a defendant in the litigation when the judgment was issued. Weule had "severed" him from the case earlier in 1997. Likewise, the state court's earlier order granting Weule's motion for summary adjudication does not preclude the bankruptcy court's independent consideration of any issue. Although Nordstrom was still a party to the suit when this order was issued, we cannot give collateral estoppel effect to this interlocutory order because there was no final judgment on the merits against Nordstrom.[2]

B. CDI Complaint

From February 26, 1993 to July 9, 1993, the California Department of Insurance ("CDI") investigated Nordstrom and his many related companies and ultimately sued in state court to enjoin him from further violating various provisions of the California Insurance Code. Nordstrom, in turn, filed a lawsuit, on behalf of himself and his

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[2] As we discuss below, Nordstrom may have been the alter ego of IIU and IIUW. If Weule could have proved that the corporate veil should have been pierced, it might have affected the foregoing collateral estoppel analysis. However, because we cannot decide whether the corporate veil should be pierced on the current record, we assume that Nordstrom is not the alter ego of the companies for this analysis. We express no opinion about whether the state court judgment has any preclusive effect against Nordstrom if he is the alter ego of IIU and IIUW.

companies, seeking an injunction to block Cease and Desist orders that had been lodged against him by the CDI. This "exchange" of litigation culminated in the state court's Order granting the CDI's application for a preliminary injunction.

Following this defeat, Nordstrom capitulated and the parties agreed to a stipulated Permanent Injunction and Judgment. Weule claims that this judgment should have had a preclusive effect on the proceedings in bankruptcy court. However, the signed stipulation explicitly states that

> John D. Nordstrom, Robert M. Thul and IIU of Washington deny any wrongdoing whatsoever and deny specifically the allegations of the Department of Insurance in the pending Cease and Desist, Accusation and Suspension proceedings before the Department of Insurance as well as the proceedings in these consolidated Cases.
>
> Nonetheless, John D. Nordstrom, Robert M. Thul and IIU of Washington, with the advice of counsel, are willing to forego their right to full evidentiary hearings on all the department's charges, and their right to a trial on the merits and they seek to bring all of these matters to a final conclusion.

This stipulation, signed by both parties and entered into the record by the court, belies any argument that the issues of intent or liability were "necessarily litigated." Thus, this judgment has no preclusive effect.

C. Guilty Plea

Weule suggests also that Nordstrom's guilty plea should have a collateral estoppel effect on this litigation. We disagree. The California Supreme Court has held that a guilty plea is not given collateral estoppel effect. *Teitelbaum Furs, Inc. v. Dominion Ins. Co.*, 375 P.2d 439, 441 (1962). This is because a guilty plea, unlike a criminal conviction after trial, "may reflect only a compromise or a belief that paying a fine is more advantageous than litigation." *Id.* We affirm the bankruptcy court's decision not to give the guilty plea preclusive effect.

II. Dismissal of the (a)(2)(A) and (a)(4) Claims.

We affirm the BAP's decision to affirm the bankruptcy court's dismissal of Weule's claims of nondischargeability under §§ 523(a)(2)(A) and (a)(4). Weule failed to allege in his complaint facts to support either of these claims.

Weule cannot allege that Nordstrom made a representation to him, which is a requirement of subsection (a)(2)(A). *Apte v. Japra (In re Apte)*, 96 F.3d 1319, 1322 (9th Cir. 1996). Nor can Weule support such a claim based on Nordstrom's representations to Moscosco, the holder of the insurance policy. We need not decide whether California law is so broad that a claim of fraud can exist under it absent a direct representation, because (a)(2)(A) is a matter of federal law.

Nor has Weule alleged a claim for nondischargeability under subsection (a)(4) because it only applies to claims "for fraud or defalcation while acting in

a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). Under bankrupcty law, an express or technical trust must create the fiduciary relationship. *In re Lewis*, 97 F.3d at 1185. Weule cannot show such a close fiduciary relationship between himself and Nordstrom.

III. Admissibility of Documentary Evidence as Proof of Alter Ego

A. Tax Returns

Evidentiary rulings are reviewed for abuse of discretion. *Norris v. Sysco Corp.*, 191 F.3d 1043, 1047 (9th Cir. 1999). The bankruptcy court's decision to exclude income tax returns produced by Nordstrom was an abuse of discretion, and the BAP erred in affirming the exclusion. Weule attempted to introduce two sets of income tax returns at trial. The first set, consisting of exhibits 58, 59, 76, 77, and 78, were obtained by Weule during discovery directly from Price Waterhouse, Nordstrom's accounting firm but not a party to the lawsuit ("Price Waterhouse returns"). Weule had not designated any Price Waterhouse witnesses who could authenticate these exhibits, and the bankruptcy court excluded the documents for this reason. This was not an abuse of discretion.

The second of set of income tax returns were designated as exhibits 38 to 50. This set consisted of personal income tax returns for Nordstrom and his wife and S-Corporation income tax returns for IIU and IIUW, covering the years 1990 to 1995 ("Nordstrom returns"). These tax returns had been handed over by defense counsel during an examination of Nordstrom conducted pursuant to Federal Rule of Bankruptcy Procedure 2004 ("2004

examination"). Nordstrom argues that even though he *produced* the returns, because Price Waterhouse *prepared* them, a Price Waterhouse representative had to authenticate the documents. We disagree.

Because Weule met his burden of producing "evidence sufficient to support a finding that the [tax forms] in question [were] what the proponent claims," Fed. R. Ev. 901(a), the Nordstrom returns were properly authenticated. All that Weule was required to do was present sufficient evidence to prove a prima facie case. *United States v. Blackwood*, 878 F.2d 1200, 1202 (9th Cir. 1989) (involving authentication of tax forms). Prior to the 2004 examination, Weule had requested that Nordstrom bring copies of these tax forms to the examination. Nordstrom's counsel was present at the 2004 examination, and he said, as he handed over the tax returns, "What Mr. Nordstrom has obtained are the tax returns for he [sic] and his wife from '91 to '95, . . . from '90 to '95 for International Insurance Underwriters, Inc., d/b/a Specialty Insurance Brokers, . . . and federal tax returns for [the years '90 – '95] for International Insurance Underwriters of Washington, Inc." During the examination, Nordstrom responded to requests by Weule's counsel to turn his attention to "IIU's return," or "your return." Nordstrom had obtained these documents from his storage room, turned over these documents in response to Weule's request for tax returns, and then represented them as "tax returns." This suggests that they are what they appear to be. *See Buziashvili v. Inman*, 106 F.3d 709, 716-17 (6th Cir. 1997) (decedent's W-2 tax forms were sufficiently authenticated even though "[t]he only foundation laid was her possession of the W-2 forms prior to sending them to her

attorney" because "they appeared to be what they purported to be").

Furthermore, the Nordstroms are designated on most, if not all, of the corporations' tax returns as "Tax Matters Persons." Under the tax laws as they existed at the time, this designation meant that the Nordstroms owed the corporation duties to represent it in all tax matters before the IRS, to identify discrepancies in the tax returns, and to initiate appeals to the IRS, and possessed a right to intervene in any tax action involving the corporation. 26 U.S.C. § 6244; 26 U.S.C. § 6231(a)(7); 26 U.S.C. § 6226; *Twenty-Three Nineteen Creekside, Inc. v. Commissioner*, 59 F.3d 130, 131-33 (9th Cir. 1995).

The BAP, and to some extent the bankruptcy court, treated the Price Waterhouse returns and the Nordstrom returns to be part of a single set of unauthenticated evidence. This was an error; although the Price Waterhouse returns were unauthenticated, Weule met his burden of showing that the Nordstrom returns were what he alleged them to be.

Nor are the Nordstrom returns inadmissible hearsay. By proffering the tax forms at the 2004 examination, and by verifying the truth of some of the information found in the tax forms, Nordstrom "manifested an adoption or belief in [the] truth" of the information contained in the returns. Fed.R.Evid. 801(d)(2)(B) (adoptive admissions by a party are not hearsay).

B. Letter to Accountants

Weule also appeals the bankruptcy court's decision to exclude a letter purportedly written by Nordstrom to his accountants. Weule did not introduce any testimony or other evidence at trial to demonstrate the document's authenticity. Although Weule now argues that the document is distinctive, and thus authenticated pursuant to Fed.R.Evid. 901(b)(4), the BAP found that Weule did nothing at trial to demonstrate the letter's distinctive features. We agree with the BAP that Weule "was not entitled to simply proffer a document and claim that [Nordstrom] had sent it," and we hold that the bankruptcy court did not abuse its discretion in excluding the letter.

IV. § 523(a)(6)

Weule's remaining claim for nondischargeability arises under § 523(a)(6). Debts are not dischargeable in bankruptcy if they were obtained "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6).

A. Alter Ego

Both the bankruptcy court and the BAP held that any proof that IIU or IIUW intended to harm Weule was not attributable to Nordstrom. According to both courts, Weule had presented insufficient evidence to allow them to disregard the corporate form.

A lower court's application of the alter ego doctrine is reviewed for clear error. *Commodity Futures Trading*

Comm'n v. Topworth Int'l, Ltd., 205 F.3d 1107, 1112 (9th Cir. 2000). We apply the law of the forum state in determining whether a corporation is an alter ego of the shareholder. *Towe Antique Ford Found. v. IRS*, 999 F.2d 1387, 1391 (9th Cir. 1993). Under California law, alter ego liability will be found when (1) there is such a unity of interest and ownership between the corporation and the controlling individual that their separate personalities no longer exist and (2) the facts are such that inequity will result otherwise. *Mesler v. Bragg Mgmt. Co.*, 702 P.2d 601, 606 (1985).

The bankruptcy court emphasized that Weule did not introduce evidence that Nordstrom neglected corporate formalities or commingled his personal funds with corporate money. As discussed above, the lower courts erred by excluding copies of the corporations' tax returns. These documents show that large sums of money were "loaned" each year from IIU and IIUW to Nordstrom and would probably have been probative of an alter ego relationship. For example, the tax forms show that IIU loaned Nordstrom $660,000 in 1995.

The tax returns suggest that the bankruptcy court should have pierced the corporate veil. However, the record before us is not adequately developed to allow us to rule definitively. What is before us is incomplete.[3] It is difficult to determine to what extent Nordstrom neglected the corporate form or commingled assets based on this partial presentation. Therefore, we remand to the

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[3] Along with the lack of full development before the bankruptcy court, we were provided only excerpts from exhibits 38 to 50.

BAP to remand to the bankruptcy court to decide whether IIU and IIUW were alter egos of Nordstrom.

B. Intent to Injure

In *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), the Supreme Court held that "[t]he word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Id.* at 61 (emphasis in original). Furthermore "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *Id.* at 64. In *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202 (9th Cir. 2001), we clarified that "under *Geiger*, the willful injury requirement of § 523(a)(6) is met when it is shown either that the debtor had a subjective motive to inflict the injury *or* that the debtor believed that injury was substantially certain to occur as a result of his conduct." *Id.* at 1208 (emphasis in original). The BAP and bankruptcy court issued their decisions before *Jercich* was filed, and under *Jercich* both courts read *Geiger* too restrictively.

The record makes abundantly clear that Nordstrom was at least "substantially certain" that his fraudulent activities would cause injury not only to the motorists covered under the policies issued, but also to third parties who were injured by those motorists. Nordstrom operated a criminal scheme to create wealth for himself and his cohorts, at the expense of these motorists and

third parties. These facts fall comfortably within the *Geiger-Jercich* standard of intent. The BAP and the bankruptcy court erred insofar as they held that subjective intent to injure Weule was required.

CONCLUSION

We reverse the BAP's decision and remand the case to it to be remanded to the bankruptcy court so that it may determine whether, if the tax returns are taken into account, Nordstrom was an alter ego of IIU and IIUW. If the bankruptcy court decides that Nordstrom was an alter ego, Weule's state court judgment should be found to be a nondischarageable debt under § 523(a)(6).

REVERSED and REMANDED.

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re	BAP No. SC-98-1506-JRyG
JOHN NORDSTROM; LOIS M. NORDSTROM, Debtors.	Bk. No. 97-01289-A7
	Adv. No. 97-90325-A7
AARON M. WEULE, Appellant,	MEMORANDUM[1]
v.	
JOHN D. NORDSTROM, Appellee.	

Argued and Submitted on December 3, 1998
at San Diego, California

Filed – February 19, 1999

Appeal from the United States Bankruptcy Court
for the Southern District of California

Honorable Jim D. Pappas, Chief Bankruptcy Judge, Presiding

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except when relevant under the doctrines of the law of the case, res judicata, or collateral estoppel. *See* BAP Rule 13 and Ninth Circuit Rule 36-3.

Before: Jones, Ryan, and Greenwald[2], Bankruptcy Judges.

Plaintiff appeals the bankruptcy court's ruling discharging the plaintiff's claim against the Debtor. The Plaintiff contends that the bankruptcy court erred in failing to grant collateral estoppel effect to certain state court rulings; that the bankruptcy court erred in dismissing his § 523(a)(2)(A)[3] and § 523(a)(4) causes of action; that the bankruptcy court abused its discretion in certain evidentiary rulings; that the bankruptcy court erred in holding that the Plaintiff needed to demonstrate a "specific intent to injure" in order to prevail on a complaint for nondischargeability under § 523(a)(6); and that the bankruptcy court abused its discretion in denying the Plaintiff's motion for reconsideration. We **AFFIRM**.

I. FACTS

John D. Nordstrom (the "Debtor"), owned and operated two related entities, International Insurance Underwriters, Inc. ("IIU") and International Insurance Underwriters of Washington, Inc. ("IIUW"). IIU was a licensed insurance broker in the State of California, IIUW was the managing general agent of several non-admitted

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[2] Hon. Arthur M. Greenwald, Bankruptcy Judge for the Central District of California, sitting by designation.

[3] Unless otherwise indicated, references to "chapter," "section/§ ," or "code" are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330. References to "Fed.R.Bankr.P." are to the Federal Rules of Bankruptcy Procedure, rules 1001-9036, which make applicable certain Federal Rules of Civil Procedure ("Fed.R.Civ.P.").

alien insurance companies selling automobile insurance in California.

On January 25, 1992, Aaron Weule (the "Plaintiff") was injured in an automobile accident in Oakland, California. The driver of the other automobile, Mr. Moscoso, had obtained insurance coverage from Kingham Atlantic National Insurance Company, BVI ("KAN"), a company incorporated in the British Virgin Islands. KAN's managing general partner in California was IIUW, the Debtor's company. Mr. Moscoso's policy showed an expiration date of December 6, 1991, and a coverage limit of $35,000.[4]

The Plaintiff sued Mr. Moscoso in state court for negligence, and on March 4, 1993, obtained a default judgment against Mr. Moscoso for approximately $45,000. In connection with his efforts to recover the judgment from Moscoso's insurance policy, the Plaintiff discovered that KAN was insolvent.

On October 22, 1993, the Plaintiff filed a state court complaint against the Debtor and his related entities, IIU and IIUW. The Plaintiff alleged that the Debtor had intentionally engaged in a fraudulent scheme to sell underfunded insurance policies. The Plaintiff alleged that this constituted a violation of California law.

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[4] Although the insurance policy had an expiration date of December 6, 1991, and the accident occurred on January 25, 1992, the insurer had not complied with the notice requirements for terminating insurance coverage under California law and the insurance policy was still in effect. Neither party to this appeal disputes that the policy was still valid.

Several years later, on January 28, 1997, the Debtor filed for chapter 7 protection. As a result, the Debtor was severed from the state court action.

The state court action continued and on April 9, 1997, a judgment was entered in favor of the Debtor against IIU and IIUW. The state court found that these companies had violated the California Insurance Code by fraudulently marketing insurance policies from undercapitalized, non-admitted insurance companies, and by intentionally failing to notify the insured of non-renewal of his policy. The state court held that IIU and IIUW were jointly and severally liable to the Plaintiff for $32,500 in compensatory damages, $85,000 for attorney's fees, and prejudgment interest and costs. Additionally, the state court held that IIU and IIUW were severally liable to the Plaintiff for $500,000 in punitive damages.

On May 6, 1997, the Plaintiff filed this adversary proceeding against the Debtor alleging a nondischargeable claim arising under §§ 523(a)(2)(A), (a)(4), and (a)(6). Alternatively the Plaintiff argued that the state court judgments against IIU and IIUW were entitled to collateral estoppel effect under the alter ego doctrine. In addition to a determination regarding discharge, the Plaintiff requested an award of punitive damages against the Debtor.

On June 6, 1997, the Defendant moved under Fed.R.Bankr.P. 7012 to dismiss the complaint for failure to state a claim upon which relief could be granted. On August 25, 1997, the bankruptcy court ruled on the Debtor's motion to dismiss. The bankruptcy court found

that the Plaintiff's claims for relief under §§ 523(a)(2)(A) and (a)(4) could not be sustained as a matter of law.

On or about September 2, 1997, the Plaintiff filed his First Amended Complaint. In the complaint the Plaintiff contended that the debt was non-dischargeable under § 523(a)(6).[5] Trial on this matter was set for March 10, 1998.

At trial, the Plaintiff introduced no witnesses, instead relying solely on documentary evidence. The Debtor likewise presented no witnesses. The Debtor had previously informed the bankruptcy court that the Debtor was under criminal investigation and would assert his Fifth Amendment privilege against self-incrimination. Consequently, the bankruptcy court made its determination solely from the documentary evidence presented.

On or about May 25, 1998, the Plaintiff made a "Motion to abate decision until conclusion of criminal proceedings by United States against John Nordstrom." The bankruptcy court denied the motion.

On June 3, 1998, the bankruptcy court entered its memorandum of decision denying the Plaintiff's § 523(a)(6) complaint. The bankruptcy court observed that the recent Supreme Court decision in *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S.Ct. 974 (1998); held that in order for an act to be willful, as defined in § 523(a)(6), that act

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[5] The Plaintiff also asserted a claim against the Debtor as the transferee of a fraudulent transfer. However, at trial the bankruptcy court dismissed this claim because it did not relate back to the original complaint and was thus time barred. The Plaintiff does not dispute this order on appeal.

must be akin to that of an intentional tort under state law, in that the actor must intend the consequences or injury resulting from the act rather than just the act itself.

The bankruptcy court noted that the Plaintiff alleged that the Debtor is the alter ego of IIU and IIUW. However, the Plaintiff failed to produce any evidence to show undercapitalization of IIU or IIUW, that the Debtor commingled personal funds with those of the corporation, or that the Debtor failed to follow corporate formalities. Consequently, the bankruptcy court held that the Plaintiff had failed to prove by competent evidence that any wrongful actions of the corporations should be attributed to the Debtor so as to pierce the corporate veil.

Further, the bankruptcy court noted that even if the Plaintiff could pierce the corporate veil, the record fails to show how any actions allegedly taken by the Debtor in connection with the insurance sales scheme were intended to harm the Plaintiff, as opposed to the insurance company's customers. The bankruptcy court held that since the announcement of *Geiger*, it is not enough to show that the Debtor engaged in conduct which resulted in financial loss to the Plaintiff. The Plaintiff is required to show that the Debtor subjectively intended to injure or harm the creditor, and the Plaintiff failed to demonstrate this point. Consequently, the bankruptcy court dismissed the complaint.

On June 19, 1998, the Plaintiff filed a motion for reconsideration. As support for the motion, the Plaintiff asserted that the Debtor had pleaded guilty in the criminal case pending against him. The Plaintiff argued that

the Debtor's plea of guilty demonstrated the requisite willful intent as required by *Geiger*.

On July 13, 1998, the bankruptcy court entered its order denying the Plaintiff's motion for reconsideration. The bankruptcy court held that the guilty plea would not overcome the deficiencies in the Plaintiff's case. Further, and more importantly, the Debtor's guilty plea was entered after the conclusion of the trial and entry of the bankruptcy court's decision in this case. Therefore, the bankruptcy court found no good cause to reconsider its decision.

The Plaintiff appeals from the final order as well as the motion for reconsideration.

II. ISSUES

Whether the bankruptcy court erred in failing to grant collateral estoppel effect to a state court judgment.

Whether the bankruptcy court erred in dismissing the Plaintiff's § 523(a)(2)(A) and (a)(4) causes of action.

Whether the bankruptcy court abused its discretion in not admitting certain documentary evidence.

Whether the bankruptcy court erred in dismissing the Plaintiff's § 523(a)(6) non-dischargeability complaint against the Debtor for failure to establish the "willful and malicious" element as announced in *Geiger*.

Whether the bankruptcy court abused its discretion in denying the Plaintiff's motion to reconsider based upon the Debtor's guilty plea in a subsequent criminal case.

III. STANDARD OF REVIEW

The bankruptcy court's decision to deny collateral estoppel effect to the state court judgment is reviewed de novo. *First National Bank v. Russell (In re Russell)*, 76 F.3d 242, 244 (9th Cir. 1995); *In re Younie*, 211 B.R. 367, 372 (9th Cir. BAP 1997). The dismissal of the Plaintiff's § 523(a)(2)(A), (a)(4) and (a)(6) claims are reviewed de novo. *In re Rogstad*, 126 F.3d 1224, 1228 (9th Cir. 1997); *In re Washington Trust Deed Service*, 224 B.R. 109, 112 (9th Cir. BAP 1998). Evidentiary rulings made by the bankruptcy court are reviewed for an abuse of discretion. *Ardmore Vending Co. v. Kim (In re Kim)*, 130 F.3d 863, 865 (9th Cir. 1997); *First Card v. Carolan (In re Carolan)*, 204 B.R. 980, 984 (9th Cir. BAP 1996). The denial of the Plaintiff's motion for reconsideration is reviewed for an abuse of discretion. *Bellus v. United States*, 125 F.3d 821, 822 (9th Cir. 1997); *Branam v. Crowder (In re Branam)*, 226 B.R. 45, 51 (9th Cir. BAP 1998).

IV. DISCUSSION

The Plaintiff lists twelve[6] issues on appeal. However, the Plaintiff's assignment of error fall into five general areas. First, the Plaintiff contends that the bankruptcy court erred in failing to accord collateral estoppel to certain state court judgments obtained against IIU and IIUW. Second, the Plaintiff contends that the bankruptcy court erred in dismissing the Plaintiff's § 523(a)(2) and

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[6] The brief only numbers up to eleven, but two different issues are numbered eight.

§ 523(a)(4) causes of action. Third, the Plaintiff contends that the bankruptcy court made several reversible errors in evidentiary rulings. Fourth, the Plaintiff contends that the bankruptcy court erred in holding that the Plaintiff was required to show a "specific intent to injure" in order to prevail on the § 523(a)(6) cause of action. Finally, the Plaintiff contends that the bankruptcy court erred in denying the Plaintiff's motion for reconsideration. We will address these issues in turn.

A. The Bankruptcy Did Not Err in Refusing to Grant Collateral Estoppel Effect to Certain State Court Judgments.

Plaintiff contends that the bankruptcy court erred in not granting collateral estoppel effect to judgments obtained against IIU and IIUW as against the Debtor in the present case. This Panel concludes that the bankruptcy court did not err.

After the Plaintiff discovered that Mr. Moscoso's insurance company was insolvent, the Plaintiff filed suit against IIU and IIUW as the general manager of the insolvent company. The Plaintiff also named the Debtor as a co-defendant. A number of years later, the Debtor filed for bankruptcy protection. Consequently, the Debtor was severed from the state court actions. Thereafter, default judgment was taken against IIU and IIUW.

In the bankruptcy court, the Plaintiff argued that notwithstanding the severance of the Debtor from the state court action, the judgment against IIU and IIUW should have collateral estoppel effect against the Debtor. The bankruptcy court was unpersuaded.

The bankruptcy court recounted that under California law collateral estoppel precludes relitigation of issues previously decided if:

> (1) the issues necessarily decided in the previous suit are identical to the issues sought to be relitigated; (2) there was a final judgment on the merits of the previous suit; and (3) the party against whom the plea is asserted was a party, or in privity with a party, to the previous suit.

(Memorandum of Decision dated August 25, 1997), citing, *San Diego County Dept. of Social Servs. v. James J.*, 3 Cal.App.4th 984, 992, 46 Cal.Rptr.2d 491, 497 (1995).

The bankruptcy court found that the first and second elements of collateral estoppel had been satisfied. However, it was the third element that was lacking. The bankruptcy court found that the

> Defendant had filed for bankruptcy and was severed as a party in the state court action prior to entry of any judgment. Because of this, Defendant clearly lacked an incentive to litigate the issues in the state court proceeding given his limited liability. Under these circumstances, the judgment should not therefore be given collateral estoppel effect *as against Defendant* in this action.

(emphasis in original).

This panel cannot conclude that the bankruptcy court erred in its ruling. The bankruptcy court properly noted that the Debtor had little incentive to litigate once he was severed from the action against IIU and IIUW. Further, the fact that IIU and IIUW failed to present a defense and thus had default judgment granted against them further

precludes the application of collateral estoppel to a party who was severed from the complaint. The bankruptcy court did not err in denying collateral estoppel effect to the state court judgments against IIU and IIUW in the Debtor's personal bankruptcy case.

B. The Bankruptcy Court Did Not Err in Dismissing the Plaintiff's § 523(a)(2)(A) and § 523(a)(4) Causes of Action.

The Plaintiff next contends that the bankruptcy court erred in dismissing his § 523(a)(2) and (a)(4) causes of action. However a review of the bankruptcy court's reasoning demonstrates that the bankruptcy court properly dismissed the Plaintiff's § 523(a)(2)(A) and (a)(4) causes of action.

The bankruptcy court recited that in order to prove fraud under § 523(a)(2)(A), the Plaintiff must prove:

> (1) that Defendant made representations to the Plaintiff; (2) that at the time the Defendant knew were false; (3) that Defendant made them with the intention of deceiving Plaintiff; (4) that Plaintiff relied on such representations; and (5) that Plaintiff sustained the alleged loss as the proximate result of the representations.

The bankruptcy court noted that the Plaintiff did not allege that the Debtor made any false representations on which the Debtor relied. If any representations were made, they were made only to Mr. Moscoso, the driver of the vehicle that struck the Plaintiff. Further, the Debtor did not allege that the loss suffered by the Plaintiff was as

a result of the representations. Consequently, the bankruptcy court dismissed the Plaintiff's § 523(a)(2)(A) cause of action.

The bankruptcy court also dismissed the Plaintiff's § 523(a)(4) cause of action. The bankruptcy court noted that to sustain a claim under § 523(a)(4) the Plaintiff must establish that the fraud or defalcation occurred pursuant to an express or statutory trust. The bankruptcy court observed that while some California decisions had implied that the relationship between an insurer and the insured as "akin" to a fiduciary relationship, no court has ever squarely held that there was a fiduciary relationship. Moreover, the bankruptcy court remarked that these "fiduciary responsibilities" do not extend beyond the terms of the insurance contract between the insured and the insurer. The bankruptcy court concluded that because there was no insurance contract between the Plaintiff and the Debtor or his entities, the parties did not stand in a fiduciary relationship. Consequently, the bankruptcy court dismissed the Plaintiff's § 523(a)(4) cause of action.

The bankruptcy court properly dismissed the two causes of action. The Plaintiff did not allege, and could not allege, that the Debtor made representations to him on which he relied or that the representations were the proximate cause of his loss. Further, the Plaintiff is unable to demonstrate that there was either a constructive or statutory trust in his favor. Consequently, the bankruptcy court properly dismissed the § 523(a)(2)(A) and (a)(4) causes of action.

C. *The Bankruptcy Court Did Not Commit Reversible Error in its Evidentiary Rulings.*

The Plaintiff next asserts that the bankruptcy court abused its discretion in failing to admit certain pieces of evidence, specifically the S-corporation tax returns of IIU and IIUW and an alleged letter from the Debtor to his accountants.

As to the S-corporation tax returns, the bankruptcy court denied admissibility because there was no authenticating witness. The document request was sent to Price Waterhouse, not to the Debtor. Consequently, these documents came from a third party with no witness to authenticate them. As the bankruptcy court ruled:

> When you send a document production request or an order from the court to the Defendant, and the Defendant responds with documents. In effect then, that's the Defendant's statement that these are true and correct documents, relevant to the request. My problem is that when that goes to a third party, then it doesn't have the same – the response to that request doesn't have the same evidentiary effect, and counsel is entitled to have that sponsoring witness who produced the documents available to identify and authenticate the documents and to cross-examine the documents. So in the absence of a sponsoring witness either as a live witness, or you could have done this through the deposition of someone through Price Waterhouse, if that was the person involved, then I don't think they are otherwise self-authenticating or admissible without that.

Given the absence of a witness who could authenticate the documents proffered, the bankruptcy court did not abuse its discretion in refusing to admit the document.

Second, the Plaintiff alleges the bankruptcy court abused its discretion in refusing to admit a letter purportedly from the Debtor to his accountant. However, as with the above documents, the Plaintiff failed to demonstrate the document's authenticity. There was no evidence introduced to demonstrate distinctive characteristics as required to authenticate a document under Fed. R. Evid. 903(b)(3). The Plaintiff was not entitled to simply proffer a document and claim the Debtor had sent it. The document was not properly authenticated and the bankruptcy court did not abuse its discretion in refusing to admit the letter.

D. The Bankruptcy Court Did Not Err in Denying the Plaintiffs § 523(a)(6) Cause of Action.

The Plaintiff argues that the bankruptcy court erred in denying his § 523(a)(6) cause of action against the Debtor. Specifically, the Plaintiff argues that it was error for the bankruptcy court to deny consideration of the Debtor's guilty plea in the criminal case as evidence of the Debtor's "specific intent to injure" as required by *Geiger*. Further, the Plaintiff argues that the bankruptcy court erred in holding that the Plaintiff failed to establish the other elements needed to prevail on a § 523(a)(6) cause of action. We will address these issues in turn.

1. *The bankruptcy court did not abuse its discretion in denying the Plaintiff's motion for reconsideration based on the Debtor's guilty plea in the criminal action.*

The Plaintiff claims the bankruptcy court abused its discretion in denying the Plaintiff's motion for reconsideration. The Plaintiff moved for reconsideration based on a guilty plea obtained in the criminal case pending against the Debtor. The Plaintiff contends that the Debtor's guilty plea conclusively demonstrates that the Debtor had the requisite intent to injure the Plaintiff as required by § 523(a)(6)'s "willful and malicious injury" standard.

The Plaintiff argues that the recent Supreme Court case of *Kawaauhua v. Geiger*, 523 U.S. 57, 118 S.Ct. 974 (1998), did not stand for the need to prove specific intent but merely required that "the actor believes that the injury is substantially certain to follow from the action." The Plaintiff is mistaken.

> Section 523(a)(6) of the Bankruptcy code provides: (a) A discharge under Section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –
>
> (6) for willful and malicious injury by the debtor to another entity or the property of another entity.

11 U.S.C. § 523(a)(6) (1994). In *Geiger* the Supreme Court held:

> The word "willful" in (a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads

> to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury." Or, Congress might have selected an additional word or words, i.e., "reckless" or "negligent," to modify "injury." Moreover, as the Eighth Circuit observed, the (a)(6) formulation triggers in the lawyers mind the category "intentional torts," as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intended "the consequences of the act," not simply "the act itself."

118 S.Ct. at 977.

The Plaintiff relies heavily on an earlier Supreme Court case, *Tinker v. Colwell*, 193 U.S. 473 (1904), for his position that the "Court rejected the need to show specific intent." However, the Supreme Court expressly confined the *Tinker* holding to cases of criminal conversion and stated, "That decision, we clarify, provides no warrant for departure from the current statutory instruction that, to be nondischargeable, the judgment debt must be 'willful and malicious injury.' " *Geiger*, 118 S.Ct. at 978.

After considering the new standard pronounced by *Geiger*, the bankruptcy court denied the Plaintiff's motion to reconsider on the grounds that "this Court does not agree that the guilty plea would overcome the deficiencies in the Plaintiff's case reviewed in this Court's Memorandum of Decision and conclusively establish a claim in Plaintiff's favor under Section 523(a)(6)." Further, the bankruptcy court noted that "Defendant's guilty plea was entered subsequent to conclusion of the trial and entry of the Court's decision in this case." Consequently, the

bankruptcy court denied the Plaintiff's motion to reconsider.

This Panel cannot conclude that the bankruptcy court abused its discretion in denying the Plaintiff's motion to reconsider. The Debtor pleaded guilty to charges involving fraud surrounding insurance policies. However, the Plaintiff was not one of Debtor's customers. Consequently, the Plaintiff still had no cause of action under § 523(a)(2)(A) or (a)(4).

Further, the fact that Debtor pleaded guilty to the fraud count, although perhaps probative of the question, does not demonstrate a specific intent to injure the Plaintiff as required under § 523(a)(6). Consequently, the bankruptcy court's determination that the Debtor's guilty plea did not provide sufficient evidence to revive the Plaintiff's case, was not an abuse of discretion.

However, even if we accepted the Plaintiff's argument, the bankruptcy court did not err in denying the Plaintiff's motion for reconsideration. In order to prevail on its § 523(a)(6) cause of action, the Plaintiff must demonstrate a causal link between the Debtor's intent and the injury sustained by the Plaintiff. In other words, the Plaintiff must demonstrate that the Debtor should be held personally liable for the actions taken by IIU and IIUW. We will proceed to examine that element of the § 523(a)(6) cause of action.

2. *The bankruptcy court did not err in dismissing the Plaintiff's § 523(a)(6) cause of action against the Debtor because the Plaintiff had failed to demonstrate a causal link between the Debtor's actions and the injury suffered by the Plaintiff.*

In order to prevail on its non-dischargeability claim the Plaintiff must demonstrate that it suffered an injury as a result of the Debtor's "willful and malicious" actions. In the present case this would require a showing by the Plaintiff that the Debtor is personally liable for the actions taken by the corporate entities. To succeed under this "alter ego" doctrine on the facts of the present case, the Plaintiff must demonstrate that at the time of the accident the Debtor's corporations were underfunded or that the Debtor had disregarded corporate formalities to such an extent that it would be inequitable to not attribute the actions of the corporation to the Debtor. *In re Pajaro Dunes Rental Agency, Inc.*, 174 B.R. 557, 582 (N.D. Cal. 1994). The Plaintiff has failed to prove either point.

As discussed above, the Plaintiff attempted to introduce various tax returns and letters from the Debtor to his accountants in an effort to demonstrate that the Debtor routinely loaned himself money from the corporation and that the corporation was operating at a loss. However, the Plaintiff failed to follow the rules of evidence, as discussed above, and the bankruptcy court properly refused to admit this evidence for lack of a sponsoring witness. In the absence of this evidence, the Plaintiff has been unable to demonstrate that the Debtor's insurance companies were underfunded at the time of the accident or that the Debtor had not observed corporate formalities. Consequently, the Plaintiff has produced no

admissible evidence in its attempt to hold the Debtor responsible for the acts of the corporations under the "alter ego" doctrine. As such, the Plaintiff has failed to demonstrate that it suffered an "injury" as a result of the Debtor's "willful and malicious" actions. Therefore, this panel cannot conclude that the bankruptcy court erred as a matter of law in dismissing the Plaintiff's § 523(a)(6) cause of action.

V. CONCLUSION

The bankruptcy court did not err in failing to grant collateral estoppel effect to the state court judgments. The Debtor had been previously severed from the state court litigation by virtue of his bankruptcy petitioner, and was not the same party against whom judgment had been entered. The bankruptcy court did not err in dismissing the Plaintiff's § 523(a)(2)(A) and (a)(4) claims because the Plaintiff was unable to plead the necessary elements of those causes of action.

The bankruptcy court did not abuse its discretion in denying the admission of certain pieces of unauthenticated evidence. Finally, the bankruptcy court did not abuse its discretion in denying the Plaintiff's motion to reconsider based on the Debtor's guilty plea even if such evidence were considered conclusive of the Debtor's "willful and malicious" actions. The Plaintiff failed to demonstrate a causal link between the Debtor's actions and the injury suffered by the Plaintiff. Consequently, the bankruptcy court did not err in dismissing the Plaintiff's § 523(a)(6) cause of action. For the foregoing reasons, we **AFFIRM**.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

IN RE	**Case No. 97-01289**
JOHN D. NORDSTROM and LOIS M. NORDSTROM,	**Adv. No. 97-90325**
Debtors.	**MEMORANDUM OF DECISION**
AARON M. WEULE,	
Plaintiff,	
vs.	
JOHN D. NORDSTROM,	
Defendant.	

Maxwell Keith, San Francisco, California for Plaintiff.

Michael T. O'Halloran, LAW OFFICE OF MICHAEL T. O'HALLORAN, San Diego, California, for Defendant.

BACKGROUND[1]

In this adversary proceeding, Plaintiff Aaron Weule ("Weule") seeks to except his claim against Defendant John Nordstrom ("Nordstrom") from discharge in Nordstrom's Chapter 7 bankruptcy case. Weule asserts that his claim falls under this Section 523(a)(6) willful and

---

[1] The undersigned was assigned to preside over this action as a visiting judge under the Ninth Circuit's Bankruptcy Workload Equalization Program.

malicious provision.[2] Weule also seeks an award of punitive damages. Following a March 10, 1998 trial,[3] the matter was taken under advisement. The Court has now duly considered the record and this Memorandum constitutes the Court's findings of fact and conclusions of law.[4] F.R.B.P. 7052.

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[2] At trial, Plaintiff's Third Cause of Action in the First Amended Complaint, a cause of action under California Civil Code § 3439, et seq., alleging a fraudulent conveyance was ordered dismissed by the Court as being untimely filed. The Court did not address the merits of the action. Rather, this dismissal was based solely on the untimely filed Amended Complaint and Plaintiff's inability to relate the now third cause of action back to the allegations of the original Complaint. After trial, on May 27, 1998, Plaintiff filed a Motion to Dismiss the Third Cause of Action seeking a statement from the Court that such dismissal does not operate as an adjudication on the merits. While the Court will grant Plaintiff's motion to voluntarily dismiss the third cause of action, the Court expresses no opinion as to the operation of the dismissal as an adjudication on the merits of that cause of action.

[3] Plaintiff called no witnesses at trial, and relied solely and exclusively upon documentary and other written evidence. Defendant appeared at trial only through counsel, and also called no witnesses to testify.

[4] Plaintiff, on May 27, 1998, filed a "Motion to Abate Decision" requesting that the Court defer decision in this action until conclusion of the criminal proceeding *United States of America v. John D. Nordstrom*. However, after considering the relevant factors, it appears that this action and any pending criminal proceedings are not related and therefore no good cause is demonstrated to withhold the Court's ruling. The Court denies the motion.

FACTS

From approximately 1990 through 1993, Nordstrom owned and operated two related entities, International Insurance Underwriters, Inc. ("IIU") and International Insurance Underwriters of Washington, Inc. ("IIUW"). IIU was a licensed insurance broker in the State of California. IIUW was the managing general agent of several non-admitted alien insurance companies selling automobile insurance in California.

On January 25, 1992, Weule was injured in an automobile accident in Oakland, California. The driver of the other automobile, a Mr. Moscoso, had previously obtained insurance coverage from one of Nordstrom's companies. Moscoso's policy showed an expiration date of December 6, 1991, and a coverage limit of $35,000.

Weule sued Moscoso in state court for negligence, and on March 4, 1993, obtained a default judgment against Moscoso for approximately $45,000. In connection with his efforts to recover the judgment from Moscoso's insurance policy, Weule discovered that the insurer that issued the policy was insolvent.

On October 22, 1993, Weule filed a state court complaint against Nordstrom and his related entities, IIU and IIUW. Weule alleged that Nordstrom had intentionally engaged in a fraudulent scheme to sell underfunded insurance policies, arguing such to be violative of California law.

Several years later, on January 28, 1997, Nordstrom filed for Chapter 7 bankruptcy relief. As a result, Nordstrom was severed from the state court action.

The state court action continued and, on April 9, 1997, a judgment was entered in favor of Weule against IIU and IIUW. The state court found that these companies had violated the California Insurance Code by fraudulently marketing insurance policies from undercapitalized, nonadmitted insurance companies, and by intentionally failing to notify the insured of nonrenewal of his policy. The state court held that IIU and IIUW are jointly and severally liable to Weule for $32,500[5] in compensatory damages, $85,000 for attorney fees, and prejudgment interest and costs. In addition, the state court held that IIU and IIUW were severally liable to Weule for $500,000 in punitive damages.

On May 6, 1997, Weule filed this adversary proceeding against Nordstrom alleging a nondischargeable claim arising under Section 523(a)(6) from Nordstrom's intentional conduct.[6] In addition to a determination regarding discharge, Weule has requested an award of punitive damages against Nordstrom.

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[5] Representing the policy limit of $35,000 less the partial satisfaction of Weule's claim against the insolvent insurer by the California Insurance Guarantee Association of $2,500.

[6] Plaintiff's Complaint also alleged that his claims against Nordstrom were excepted from discharge under the fraud exception, 11 U.S.C. § 423(a)(2)(A). However, the Court has previously granted summary judgment to the Defendant as to said claims, in that Defendant engaged in no fraud as against Plaintiff as compared to Defendant's customers. *See* Memorandum of Decision, August 25, 1997, Docket No. 20, and Order dated August 25, 1997, Docket No. 21.

DISCUSSION

Weule asserts that Nordstrom directed a scheme to defraud policy holders, engaging in intentional conduct that justifies a finding that the claim is nondischargeable under Section 523(a)(6).

Section 523(a)(6) provides:

> (a) A discharge does not discharge an individual debtor from any debt –
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

11 U.S.C. § 523(a)(6). Weule, in order to prevail under the statute, must prove by a preponderance of the evidence that Nordstrom's actions were "willful and malicious." *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

A new decision by the Supreme Court concerning exceptions to discharge is of importance in this case. In order for an act to be willful, as that term is utilized in the Bankruptcy Code discharge exception, the act must be akin to that of an intentional tort under state law, in that the actor must intend the consequences or injury resulting from the act rather than just the act itself. *Kawaauhau v. Geiger*, ___ U.S. ___, 118 S.Ct. 974, 977 (1998). The Supreme Court explained:

> The word "willful" in (a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts

> that cause injury." Or, Congress might have selected an additional word or words, i.e., "reckless" or "negligent," to modify "injury."

Id.

This standard requires that a bankruptcy debtor commit more than a reckless or negligent act. This holding modifies the previous standard applicable in the Ninth Circuit, which required only an intentional act rather than an intended injury. *Id.*; *See also Murray v. Bammer (In re Bammer)*, 131 F.3d 788, 791 (9th Cir. 1997) and *Impulsora Del Territorio Sur, S.A., v. Cecchini (in re Cecchini)*, 780 F.2d 1440, 1443 (9th Cir. 1986).

Here, Nordstrom's corporate entities are allegedly guilty of the wrongful activities. Ordinarily, a corporation is regarded as a legal entity separate and distinct from its stockholders, officers, and directors. *Robbins v. Belcher*, 52 Cal. App. 4th 886, 892, 60 Cal. Rptr. 2d 815, 818 (1997). However, under the alter ego doctrine, when a corporation is employed by an individual to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, a court may disregard the corporate entity and treat the corporation's act as if it were done by the person actually controlling the corporation. *Hennessey's Tavern, Inc. v. American Air Filter Co., Inc.*, 204 Cal. App. 3d 1351, 1358-59, 251 Cal. Rptr. 859, 863 (1988). In general, the two requirements for operation of the alter ego doctrine are that (1) there is such a unity of interest and ownership between the corporation and the individual controlling it that their separate personalities no longer exist, and (2) failure to disregard the corporate entity would sanction a fraud or promote injustice. *Robbins*, 52 Cal. App. 4th at 892, 60 Cal. Rptr. 2d at 818.

The doctrine is applicable where an innocent party attacks the corporate form as to an injury to that party's interests. *Robbins*, 52 Cal. App. 4th at 892, 60 Cal. Rptr. 2d at 818. A claim against the alter ego defendant is identical with that claimed by the plaintiff against the already-named defendant. *Hennessey's Tavern*, 204 Cal. App. 3d at 1359, 251 Cal. Rptr. at 863.

In this instance, Plaintiff alleges that Defendant controlled the insurance agencies, directing and supervising them in the wrongful sale of auto insurance in undercapitalized companies to the public.

Under the first prong of the alter ego doctrine, corporate factors considered include undercapitalization, commingling of funds and assets, failure to recognize corporate formalities, ownership, and leadership. Weule has not presented evidence to show the undercapitalization of IIU or IIUW. While there is evidence in the record showing Kingham Atlantic National Insurance Co. (KAN) to arguably have been insolvent, it is not KAN's corporate shield that Weule seeks to pierce, but that of IIU and IIUW.

Next, Weule has presented evidence indicating Nordstrom owned in excess of 70% of both IIU and IIUW. Nordstrom also served as an officer, director, and employee of the entities. However, Nordstrom was not the only actor for the corporate entities. The record indicates that Robert Thul, President of IIU, took actions in the direction of the related corporations. Therefore, the mere fact that Nordstrom owned a controlling interest and participated in the operations of IIU and IIUW is not sufficient, by itself, to pierce the corporate veil.

Weule has also failed to present any evidence indicating that Nordstrom commingled personal funds or assets with those of the corporate entities or that IIU or IIUW failed to follow corporate formalities.

Considering all relevant factors, the alter ego doctrine should not be applied in this instance. Plaintiff has failed to prove by competent evidence that any wrongful actions of the corporations should be attributed to Nordstrom so as to justify piercing the corporate veil. For this reason, Weule's Section 523 (a)(6) claim can not rely upon actions taken by the corporation, as compared to Nordstrom. Without piercing the corporate veil, there is simply not basis for the (a)(6) claim, nor for an award of punitive damages.

Moreover, even if Weule could pierce the corporate veil of the entities in this case, the record fails to show how any actions allegedly taken by Nordstrom in connection with the insurance sales scheme were intended to harm Weule, as opposed to the entities' insurance customers, such as Moscoso. Since the Supreme Court's articulation of the standard of proof required in Section 523(a)(6) action in *Geiger*, it is not enough to show that Nordstrom engaged in conduct which resulted in a financial loss to Weule. While Plaintiff invites the Court to speculate, such is no substitute for proof by a preponderance of the evidence. In discharge litigation, the creditor must now show that the debtor subjectively intended to injure or harm the creditor, *Kawaauhau v. Geiger*, ___ U.S. ___, 118 S.Ct. 974, 977 (1998), and Weule's proof falls short in this regard.

CONCLUSION

For the reasons set forth above, Plaintiff's claims against Defendant are not excepted from discharge under Section 523(a)(6). Under the limited evidence presented, the alter ego doctrine will not be applied to pierce the corporate veil and to hold Nordstrom individually liable to Weule for the companies' tortious scheme. In addition, even if Weule could show he held enforceable claims against Defendant, Weule has not shown that through Nordstrom's conduct Nordstrom intended to harm or injure Weule, all as required by the case law.

Counsel for Defendant shall promptly submit an appropriate form of judgment for entry incorporating the various holdings of the Court set forth above and dismissing this action.

DATED this 3rd day of June, 1998.

/s/ Jim D. Pappas
JIM D. PAPPAS
CHIEF U. S. BANKRUPTCY JUDGE
DISTRICT OF IDAHO
VISITING JUDGE

Supreme Court, U.S.
FILED
JUL 6 2001
OFFICE OF THE CLERK

No. 00-1836

In The

Supreme Court of the United States

JOHN D. NORDSTROM,

Petitioner,

v.

AARON M. WEULE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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41 pp

I. STATEMENT OF THE CASE

Petitioner has omitted the facts underlying the conclusions of law below. The admissions of Petitioner to the government's Information affords an introduction to the depth and breadth of Mr. Nordstrom's scheme to collect 100 million dollars in premiums, under his control, for worthless automobile liability insurance during the period 1989 to 1993. Petitioner's plea of guilty to the Information was before the courts below and will become admissible evidence. *Teitelbaum Furs, Inc. v. Dominion Insurance Company*, (1962) 375 P.2d 439 (App. 7). The plea of guilty of Petitioner to the Information was part of the record below as Exhibit M. Ex. M. is attached hereto, Respondent's Appendix, (R. App.).

REASONS FOR DENYING THE WRIT

I. Petitioner Engaged in an Intentional Plan to Cause Financial Injury to California Drivers for His Economic Benefit. Respondent's Damages Arising from The Unlawful Plan Cannot Be Discharged Under *Geiger*.

Liability for damages arising from an intentional tort has rested upon the proof that either the actor acted upon a desire to cause the injuries or that he held a belief that the injuries are substantially certain to result from the acts. Restatement (Second) of Torts sec. 8A (1964); cited in *Kawaauhau v. Geiger*, 523 U.S. 57, 62, 118 S.Ct. 42, 78. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on grounds of innocent

intent. *Agnew v. United States* (1897) 165 U.S. 36, 53. *Geiger* makes clear that the exceptions to a discharge from bankruptcy under 11 U.S.C. sec. 523(a) (6) may involve intentional torts when the actor believes that the consequences are substantially certain to follow from his plan. Nordstrom is chargeable with knowledge of the objectives of insureds in paying for and carrying automobile liability insurance; that a State of California program to allow only the sale of insurance policies by insurers possessing minimum capitalizations existed requiring licensing and affirmation of due diligence; and the necessary consequence that those injured by drivers who are holders of worthless insurance who are unable to make satisfaction will suffer injurious financial loss. Under a California statute the insured possesses an insurance contract which provides that upon a judgment against the insured, the victim may sue the insurer upon the judgment subject to the terms and limitations of the policy. Calif. Ins. Code sec. 11580(b) (2). The effect of the Statute is to create a contractual relationship with the insured as completely as if the injured person had been specifically named in the policy. *Bias v. Ohio Farmers Indemnity Co.* (1938) 28 Cal. App. 2d 14, 16. It is the public policy of California to protect the innocent victim of the careless use of automobiles from an inability to sue a financially responsible defendant. *Barrera v. State Farm Mut. Auto. Ins. Co.* (1969) 71 Cal. 2d 659. The Insurance Code of the State of California utilizes criminal law and shut down procedures to protect the public from drivers holding worthless insurance policies. (Calif. Ins. Code secs. 703, 1668.5(a) (4), 1668(1), 1738, 1748.5, 1761, 1763, 1764.4, 1764.7, 1765,

1776). The penal code of the State makes it a misdemeanor for any person to procure insurance for sale in the State from an insurer not incorporated in the State who has not filed the bond required by the State (Calif. Penal Code sec. 439). *Geiger* emphasized that the application of 523(a) (6) may be satisfied upon the showing that acts were committed with the belief that injurious consequences were substantially certain to occur. In contrasting the intent involving in *McIntyre v. Kavanaugh* (1916) 242 U.S. 138 with the facts in *Davis v. Aetna Acceptance Co.* (1934) 293 U.S. 328, the Court made it clear that the general rule specified in the Restatement of Torts is of sufficient formulation and that, as noted by the Ninth Circuit, below, each case will stand or fall within its standard (App. 14).

II. Proof of Alter Ego Control of IIU and IIUW Would Expose the Petitioner to Having Used the Corporate Shield as a Devise to Prevent Creditor From Satisfaction for His Injuries.

Nordstrom asserts the unsupported claim that the stay provisions of the Bankruptcy Code affect the privity element inherent in the finding of alter ego control over his corporations. Petitioner urges that a bankruptcy stay precludes an estoppel effect to the findings, after extensive litigation, that his corporations injured Respondent pursuant to a fraudulent scheme to sell underfunded insurance policies in violation of California law. Petitioner's corporations and Petitioner entered into extensive litigation with respondent in Alameda County (App.

5). Alter ego findings establish that Petitioner is responsible for the satisfaction of the judgment against the corporations. The stay order required Respondent to litigate in the Petitioner's bankruptcy venue; it does not eradicate litigation against the corporate entities. Alter ego findings also satisfy the privity element now found wanting (Id.). Respondent has attached hereto, as part of his Appendix, the Memorandum of Decision of the Bankruptcy Judge below, filed August 25, 1997. Petitioner's Appendix 3 incorrectly set forth a filing date of August 25, 1997. Appendix 3 was filed on June 3, 1998. A finding of alter ego will establish that the Alameda County litigation was carried on under the control of Petitioner and that he is responsible to Respondent on the judgment. See *Parklane Hosiery Company v. Shore* (1979) 439 U.S. 322; *United States v. Gottheiner* (9th Cir. 1983) 703 F.2d 1136; *Yarbrow v. Fed. Dep. Ins. Co.* (9th Cir. BAP 1993) 150 B.R. 233; *Waugh v. Eldridge* (8th Cir. 1996) 95 F.3d 706; *Coover v. First Colony Life Ins. Co.*, (S.D. Fla. 1987) 70 B.R. 554. This Court has held that the bankruptcy proceedings of alter ego corporations should always be subject to vigorous scrutiny in equity. *Pepper v. Litton* (1939) 308 U.S. 295.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Dated: June 28, 2001

Respectfully submitted,

MAXWELL KEITH
Attorney for Respondent

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EXHIBIT M

MAXWELL KEITH
133 Commonwealth Ave.
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Attorney for Plaintiff

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

Bankruptcy No. 97-01289-A7 In Re John D. and Lois M. Nordstrom, Debtors _____/ Aaron M. Weule, Plaintiff v. John D. Nordstrom, Defendant _____/	Adv. Pro. No. 97 90325 DECLARATION OF MAXWELL KEITH IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OF DECISION ENTERED JUNE 3, 1998 (Filed June 22, 1998)

I, MAXWELL KEITH, declares as follows:

1. I am the attorney for movant, AARON WEULE, a creditor in the above-entitled matter.

2. I am licensed to practice before this Court.

3. I have personal knowledge of the following facts and am competent to testify as to the truth of these facts if called as a witness.

4. Plaintiff has heretofore filed a motion to abate decision depending on the conclusion of criminal proceedings by United States against John Nordstrom in the Central District of California.

5. The Court, in its Memorandum of Decision, filed June 3, 1998 declined to abate the decision. See page 2-3, fn. 4. The Court stated that the papers filed indicated that the adversary proceeding and any pending criminal proceeding were not related.

6. Attached hereto and marked as Exhibit 1 to the Request for Judicial Notice is a certified copy of the Information filed by the United States against John D. Nordstrom, Cr. 98-564.

7. Attached hereto and marked as Exhibit 2 to the Request for Judicial Notice is a certified copy of the docket entries in Cr. 98-654. The first time which I have inspected Exhibits 1 and 2 was on June 17, 1998.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 19, 1988 at San Francisco, CA.

_____

Maxwell Keith

Exhibit 1

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JOHN NORDSTROM, Defendant.	No. CR 98-564 INFORMATION [18 U.S.C. § 371: Conspiracy] (Filed May 23, 1998)

The U.S. Attorney charges:

COUNT ONE

[18 U.S.C. § 371]

I. INTRODUCTION

At all times relevant to this indictment:

1. Defendant JOHN NORDSTROM was the principal owner of International Insurance Underwriters ("IIU"), whose primary offices were in the State of Washington. As the principal owner of IIU, defendant NORDSTROM hired and oversaw the actions of IIU's corporate officers, directed IIU's operations, and implemented and approved IIU's policies and procedures, which included defendant NORDSTROM's diversion of significant amounts of consumer funds from IIU's bank accounts to his own accounts, to other companies he controlled, to his family members for their personal expenses and to others.

2. IIU was defendant NORDSTROM's creation and generated money as an insurance administrator by managing offshore insurance carriers (hereinafter "the IIU affiliated offshore carriers") which were not admitted or licensed to sell insurance in the State of California and marketing insurance policies issued by the IIU affiliated off-shore carriers to California consumers who sought low cost auto-insurance. By advertising in the retail auto insurance data-base what appeared to be the lowest rates for auto insurance, auto insurance policies issued by the IIU affiliated off-shore carriers and marketed by IIU were purchased by thousands of California consumers from 1989-1993, and IIU amassed over $100 million dollars in policy fees.

3. All of the IIU affiliated off-shore carriers ultimately failed or were shut down by the California Department of Insurance (DOI). These off-shore carriers were actually under-capitalized, shell corporations with inflated financial statements. Several of them had mail drop addresses on Caribbean islands while others were not even licensed as insurance carriers in their claimed countries of origin. These IIU affiliated off-shore carriers included American Trust, Winston Hill, Kingham Atlantic, United States and Continental (US&C), Financial Services Limited, Trelawney Insurance Limited, Universal Reinsurance and Insurance, Domestic Insurance Limited, and Commercial Indemnity Assurance Limited.

4. IIU sought to sell as many auto-insurance policies issued by each of its affiliated off-shore carriers as possible, even though the majority of these carriers had difficulties honoring the auto-insurance policies they sold, until the DOI barred the carrier from operation, at which

point another IIU affiliated off-shore carrier would assume the policies of the barred carrier. This IIU affiliated off-shore carrier would also ultimately fail or be ordered to cease sales to California consumers, at which point another IIU affiliated off-shore carrier would assume the policies. The life-span of each IIU affiliated off-shore carrier ranged from as little as several months to no more than one and one-half years.

5. IIU operated in such a way that consumers would have difficulty identifying their insurance carrier and determining to whom they should turn when, as often happened, the carrier from which they had originally purchased insurance was no longer in business. Consumer contacts to IIU went unheeded or were referred to intermediaries in Marina del Rey and Van Nuys, California, selected by defendant NORDSTROM, who themselves often directed the aggrieved consumers back to IIU in Washington where they would be ignored. In this way, significant numbers of consumers were deprived of the protection of the automobile insurance they had contracted for and were denied the premium refunds required by law.

II. OBJECTS OF THE CONSPIRACY

6. Beginning on a date unknown and continuing through June 1993, within the Central District of California and elsewhere, defendant NORDSTROM, together with others known and unknown, knowingly and deliberately conspired, confederated, and agreed to commit mail and wire fraud by knowingly devising, participating in, and executing a scheme to defraud, and to obtain

money and property by means of false and fraudulent pretenses, representations, promises, and omissions and concealments of material facts, and causing the use of the United States mails and interstate wire transmissions for the purpose of executing such scheme to defraud and attempting to do so, in violation of Title 18, United State Code, Sections 1341 and 1343.

III. THE MANNER AND MEANS OF THE CONSPIRACY

7. In carrying out the conspiracy, defendant NORDSTROM, together with others known and unknown, knowingly engaged in the following fraudulent and deceptive acts, practices, and devices, among others:

(a) Defendant NORDSTROM falsely represented and caused others to falsely represent that certain of the IIU affiliated off-shore insurance carriers were financially viable and able to meet their obligations when, in fact, the IIU affiliated carriers were, as a general rule, financially troubled companies that were incapable of remaining in business long enough to pay any significant number of claims, premium refunds, and other obligations.

(b) Defendant NORDSTROM structured and caused others to structure premium payment terms on policies issued by the IIU affiliated off-shore carriers to be the lowest advertised in a computerized retail database so that consumers seeking the lowest down payment terms would select a policy issued by an IIU affiliated off-shore carrier.

c) Defendant NORDSTROM requested daily reports on the volume of applications and the collection of policy fees for IIU affiliated off-shore carriers, in part, so that he could be apprised of the amount of funds deposited in the IIU accounts, and could have a portion of those funds diverted to him by way of a check or wire transfer of funds.

d) Defendant NORDSTROM directed that consumer insurance applications be stripped of premium checks and that the funds derived from the checks be placed into IIU bank accounts to be utilized, in significant part, for the personal benefit of defendant NORDSTROM.

e) Defendant NORDSTROM took and caused others to take unearned premiums that were supposed to be held in a trust account until they were earned, and used and caused others to use significant amounts of those unearned premiums to pay for items and services for the benefit of defendant NORDSTROM while falsely classifying the payments as distributions or loans.

(f) Defendant NORDSTROM delayed and caused others to delay the processing of refunds for months, if ever, with the result that consumers often were denied repayment for insurance services for which they had paid but which were not rendered. In this way, premium funds remained available in the IIU operating account for defendant NORDSTROM's personal use. The delay in refunds also enabled new IIU affiliated off-shore carriers to assume the debt of the former carrier, leaving consumers at a loss to locate the proper company from which to request refunds.

(g) Defendant NORDSTROM implemented procedures to under-report the volume of policy sales in order to deprive carriers of premiums needed to pay claims and make premium refunds and enable funds to be diverted to himself, to companies he owned or controlled, or others he designated.

VI. OVERT ACTS

8. In furtherance of the conspiracy, defendant NORDSTROM, and others known and unknown, committed one or more of the following overt acts, among others:

1) On or about May 7, 1990, defendant NORDSTROM caused a $23,000 check to be issued from the IIU operating account and mailed, via the U.S. Mail, to himself.

2) On or about May 25, 1990, defendant NORDSTROM caused a $50,000 check to be issued from the IIU operating account and mailed, via the U.S. Mail, to Emerald City Insurance Marketing, a company he controlled.

3) On or about May 29, 1990, defendant NORDSTROM caused a $22,000 check to be issued from the IIU operating account and mailed, via the U.S. Mail, to himself.

4) On or about August 1, 1990, defendant NORDSTROM caused an $80,000 check to be issued from the IIU operating account and mailed, via the U.S. Mail, to himself.

5) On or about September 18, 1990, defendant NORDSTROM caused a $30,000 check to be issued from the IIU operating account and mailed, via the U.S. Mail, to himself.

6) On or about November 13, 1990, defendant NORDSTROM caused a $30,000 check to be issued form the IIU operating account and mailed, via the U.S. Mail, to himself.

7) On or about December 4, 1990, defendant NORDSTROM caused an $85,000 check to be issued from the IIU operating account and mailed, via the U.S. Mail, to himself.

8) On or about, February 1, 1991, defendant NORDSTROM caused a $500,000 check to be issued from the IIU operating account to fund a loan to an acquaintance of his.

9) On or about February 1, 1991, defendant NORDSTROM caused a $100,000 wire transfer from the IIU operating account in Seattle, Washington to a personal bank account in his name in San Diego, California.

10) On or about April 16, 1991, defendant NORDSTROM caused a $30,000 wire transfer from the IIU operating account in Seattle, Washington to a personal bank account in his name in San Diego, California.

11) On or about April 30, 1991, defendant NORDSTROM caused a $25,500 wire transfer from the IIU operating account in Seattle, Washington to a personal bank account in his name in San Diego, California.

12) On or about May 21, 1991, defendant NORDSTROM caused a $35,000 wire transfer from the IIU

operating account in Seattle, Washington to a personal bank account in his name in San Diego, California.

13) On or about June 5, 1991, defendant NORDSTROM caused a $25,000 wire transfer from the IIU operating account in Seattle, Washington to a personal bank account in his name in San Diego, California.

14) On or about September 4, 1991 defendant NORDSTROM caused a $36,844.34 wire transfer from the IIU operating account in Seattle, Washington to his personal bank account in San Diego, California.

15) On or about September 24, 1991 defendant NORDSTROM caused a $35,000 wire transfer from the IIU operating account in Seattle, Washington to his personal bank account in San Diego, California.

16) On or about October 21, 1991 defendant NORDSTROM caused a $135,000 wire transfer from the IIU operating account is Seattle, Washington to his personal bank account in San Diego, California.

17) On or about November 1, 1991 defendant NORDSTROM caused a $28,000 wire transfer from the IIU operating account in Seattle, Washington to his personal bank account in San Diego, California.

18) On or about January 21, 1992 defendant NORDSTROM caused a $32,000 wire transfer from the IIU operating account in Seattle, Washington to his personal bank account in San Diego, California.

19) On or about March 3, 1992 defendant NORDSTROM caused a $47,410.25 wire transfer from the IIU premium trust account in Seattle, Washington to the account of JAKNOR, INC., a company recently formed

and owned by defendant NORDSTROM, in San Diego, California.

20) On or about March 13, 1992, defendant NORDSTROM caused a $6833.33 check to be issued from the IIU operating account and mailed, via the U.S. Mail, to the San Diego Charger Associates for the rental of a luxury viewing suite at a San Diego Sports Stadium.

21) On or about April 17, 1992 defendant NORDSTROM caused a $26,080 wire transfer from the IIU operating account in Seattle, Washington to his personal bank account in San Diego, California.

22) On or about April 22, 1992, defendant NORDSTROM caused an $85,755.29 wire transfer from the IIU premium trust account in Seattle, Washington to the account of JAKNOR, INC., a company recently created and owned by defendant NORDSTROM, in San Diego, California.

23) On or about May 18, 1992 defendant NORDSTROM caused a $6833.33 check to be issued from the IIU operating account and mailed, via the U.S. Mail, to the San Diego Chargers Professional Football Team for the rental of a luxury viewing suite at a San Diego sports stadium.

24) On or about May 19, 1992, defendant NORDSTROM caused a $60,000 wire transfer from the IIU premium trust account in Seattle, Washington to the account of JAKNOR, INC., a company recently created and owned by defendant NORDSTROM, in Sand Diego, California.

25) On or about May 28, 1992 defendant NORDSTROM caused an $80,000 wire transfer from the IIU operating account in Seattle, Washington to his personal bank account in San Diego, California.

26) On or about June 23, 1992, defendant NORDSTROM caused a $55,034.46 wire transfer from the IIU premium trust account in Seattle, Washington to the account of JAKNOR, INC., a company owned by defendant NORDSTROM, in San Diego, California.

27) On or about July 6, 1992 defendant NORDSTROM caused a $6833.33 check to be issued from the IIU operating account and mailed, via the U.S. Mail, to the San Diego Chargers Professional Football Team for the rental of a luxury viewing suite at a San Diego sports stadium.

28) On or about July 17, 1992, defendant NORDSTROM caused two wire transfers in the amounts of $80,217.19 and $10,537.10 from the IIU premium trust account in Seattle, Washington to the account of DDWJ, INC., a company recently created and owned by defendant, NORDSTROM, in San Diego, California.

29) On or about August 12, 1992 defendant NORDSTROM caused an $83,388.94 wire transfer from the IIU premium trust account in Seattle, Washington to the account of DDWJ, INC., a company created and owned by defendant NORDSTROM, in San Diego, California.

30) On or about September 10, 1992, defendant NORDSTROM caused a $40,000 wire transfer from the IIU operating account in Seattle, Washington to the bank account in Los Angeles, California, of Toma Surplus Lines

Brokers, a company co-owned by defendant NORDSTROM in Marina del Rey, California, for the purpose of providing a personal loan to an acquaintance of defendant NORDSTROM.

31) On or about September 15, 1992 defendant NORDSTROM caused a $17,555.25 wire transfer from the IIU premium trust account in Seattle, Washington to the account of DDWJ, Inc., a company created and owned by defendant NORDSTROM, in San Diego, California.

32) On or about September 24, 1992, defendant NORDSTROM caused a $17,657.93 wire transfer from the premium trust account of IIU in Seattle, Washington to the account of DDWJ, Inc., a company created and owned by defendant NORDSTROM, in San Diego, California.

33) On or about September 30, 1992, defendant NORDSTROM caused a $32,085.87 wire transfer from the premium trust account of IIU in Seattle, Washington to the account of DDWJ, Inc., a company created and owned by defendant NORDSTROM, in San Diego, California.

34) On or about October 15, 1992, defendant NORDSTROM caused a $59,014.20 wire transfer from the account of IIU in Seattle, Washington to the bank account in Los Angeles, California, of Toma Surplus Lines, for the purpose of funding $30,000 of a loan to a personal acquaintance of defendant NORDSTROM.

35) On or about October 20, 1992, defendant NORDSTROM caused a $91,508.60 wire transfer from the IIU premium trust account in Seattle, Washington to the account of DDWJ, Inc., a company created and owned by defendant NORDSTROM, in San Diego, California.

36) On or about November 23, 1992, defendant NORDSTROM caused a $30,000 wire transfer from the IIU operating account in Seattle, Washington to the bank account in Los Angeles, California, of Toma Surplus Lines, for the purpose of funding a loan to a personal acquaintance of defendant NORDSTROM.

37) On or about December 28, 1992 defendant NORDSTROM caused a $40,000 wire transfer from the IIU operating account in Seattle Washington to his personal bank account in San Diego, California.

38) On or about January 6, 1993, defendant NORDSTROM caused a $30,000 wire transfer from the IIU operating account in Seattle, Washington to his personal bank account in San Diego, California.

39) On or about February 17, 1993, defendant NORDSTROM caused a $30,000 wire transfer from the IIU operating account in Seattle, Washington to the account of Nordstrom and Tanner Insurance Broker in Pleasanton, California, a company controlled by defendant.

40) On or about February 22, 1993, defendant NORDSTROM caused a $75,000 wire transfer from the IIU operating account in Seattle, Washington to the account of Nordstrom and Tanner Insurance Broker in Pleasanton, California, a company controlled by defendant.

41) On or about February 23, 1993, defendant NORDSTROM caused a $50,000 wire transfer from the IIU operating account in Seattle, Washington to the account of Nordstrom and Tanner Insurance Broker in Pleasanton, California, a company controlled by defendant.

42) On or about February 25, 1993, defendant NORDSTROM caused a $30,000 wire transfer from the IIU operating account in Seattle, Washington to the account of Nordstrom and Tanner Insurance Broker in Pleasanton, California, a company controlled by defendant.

43) On or about March 9, 1993 defendant NORDSTROM caused a $7005.16 check from the IIU operating account to be issued and mailed, via the U.S. Mail, to the San Diego Chargers Football Team for the rental of a luxury suite at a San Diego Sports stadium.

44) On or about April 21, 1993, defendant NORDSTROM caused a $55,000 wire transfer from the IIU operating account in Seattle, Washington, to the account of Nordstrom and Tanner Insurance Broker in Pleasanton, California, a company controlled by defendant.

45) On or about May 12, 1993, defendant NORDSTROM caused a $7005.16 check from the IIU operating account to be issued and mailed, via the U.S. Mail, to the San Diego Chargers Professional Football Team, for the rental of a luxury viewing suite at a San Diego sports stadium.

46) On or about May 14, 1993, defendant NORDSTROM caused a $10,000 wire transfer from the IIU operating account in Seattle, Washington to the account

of Nordstrom and Tanner Insurance Broker in Pleasanton, California, a company controlled by defendant.

RICHARD DROOYAN,
Chief Assistant United States Attorney
Acting United States Attorney

/s/ David C. Scheper
DAVID C. SCHEPER
Assistant United States Attorney
Chief, Criminal Division

SEAN BERRY
Assistant United States Attorney
Chief, Major Frauds Section

Exhibit No. 2

TRANSF

U.S. District Court
Central District of California (Western Div.)

CRIMINAL DOCKET FOR CASE #: 98-CR-564-ALL

Filed: 05/29/98

USA v. Nordstrom
Dkt# in other court: None

Case Assigned to: Judge Edward Rafeedie

JOHN NORDSTROM (1) Defendant	Thomas Pollack [COR LD NTC ret] 1800 Avenue of the Stars Suite 500 Los Angeles, CA 90067 310-203-7613

Pending Counts:	Disposition
18:371:CONSPIRACY (1)	
Offense Level (opening):	4
Terminated Counts:	NONE
Complaints:	NONE
U. S. Attorneys:	NONE

5/29/98	1	INFORMATION filed against John Nordstrom (1) count(s) 1 Offense occurred in LA. (vf) [Entry date 06/01/98]
5/29/98	2	CASE SUMMARY filed by AUSA Julie Werner-Simon, attorney for USA, as to John Nordstrom. Defendant's date of birth: 2/6/38. (vf) [Entry date 06/01/98]

5/29/98	3	WAIVER OF INDICTMENT filed as to John Nordstrom. Approved. (mc) [Entry date 06/12/98]
6/1/98	11	Filing of PLEA AGREEMENT filed by USA as to John Nordstrom (es) [Entry date 06/18/98]
6/8/98	4	MINUTES OF POST-INDICTMENT ARRAIGNMENT HEARING held before Magistrate Judge Carla M. Woehrle as to John Nordstrom: Case reassigned to Judge Carlos R. Moreno. First appearance of John Nordstrom entered. Retained Attorney Thomas Pollack present. Plea and trial setting set for 2:00pm, 6/8/98 for John Nordstrom. Tape No.: 2024 (mc) [Entry date 06/12/98]
6/8/98	5	DESIGNATION AND APPEARANCE of Attorney for John Nordstrom (mc) [Entry date 06/12/98]
6/8/98	6	STATEMENT OF DEFENDANT'S CONSTITUTIONAL RIGHTS filed as to John Nordstrom. (mc) [Entry date 06/12/98]
6/8/98	7	WAIVER OF INDICTMENT filed as to John Nordstrom. Approved. (mc) [Entry date 06/12/98]
6/8/98	8	BOND AND CONDITIONS OF RELEASE filed as to John Nordstrom, in the amount of: $100,000. Approved by Magistrate Judge Carla M. Woehrle. (mc) [Entry date 06/12/98]
6/8/98	9	ORDER RE TRANSFER PURSUANT TO GENERAL ORDER 224 (Related Case) filed as to John Nordstrom. (Related Case No.: CR97-591-ER) Case transferred from

		Judge Carlos R. Moreno to Judge Edward Rafeedie for all further proceedings. The case number will now reflect the initials of the reassigned judge, (CR98-564-ER). (mc) [Entry date 06/12/98]
6/8/98	10	MINUTES OF CHANGE OF PLEA HEARING held before Judge Edward Rafeedie as to John Nordstrom: Defendant moves to change plea to the Info. Plea of guilty entered by John Nordstrom (1) count(s) 1. The Court questions the defendant regarding plea of guilty and finds it knowledgeable and voluntary and orders the plea accepted and entered. The Court refers John Nordstrom to the Probation Office for investigation and report. Sentencing hearing set for 4:30pm, 9/8/98 for John Nordstrom. C/R: Mary Tucker (mc) [Entry date 06/15/98]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

IN RE JOHN D. NORDSTROM and LOIS M. NORDSTROM, Debtors.	Case No. 97-01289
AARON M. WEULE, Plaintiff, vs. JOHN D. NORDSTROM, Defendant.	Adv. No. 97-90325 MEMORANDUM OF DECISION (Filed Aug. 25, 1997)

Maxwell Keith, San Francisco, California, for Plaintiff.

Cheryl L. Stengel, LAW OFFICE OF MICHAEL T. O'HALLORAN, San Diego, California, for Defendant.

Background.[1]

In this adversary proceeding, Plaintiff Aaron Weule seeks a determination that his claim against Defendant John Nordstrom is excepted from discharge in Defendant's Chapter 7 bankruptcy case pursuant to 11 U.S.C. §§ 523(a)(2), 523(a)(4), and 523(a)(6), and for an award of

[1] The undersigned was assigned to preside over this action as a visiting judge under the Ninth Circuit's Bankruptcy Workload Equalization Pilot Program.

damages. The matter came on for hearing before the Court on July 22, 1997, on Defendant's Motion to Dismiss and, alternatively, for More Definitive Statement. The Court took the motion under advisement.

Applicable Law.

The purpose of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Federal Procedure, made applicable here under F.R.B.P. 7012, is to test the legal sufficiency of a plaintiff's claims for relief. In determining whether the plaintiff has advanced potentially viable claims, the complaint is be construed in a light most favorable to the plaintiff and its allegations taken as true. *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Church of Scientology of Ca. v. Flynn*, 744 F.2d 694, 696 (9th Cir. 1984). In reviewing the allegations of a complaint, however, legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness. *See Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). The court may also consider judicially-noticed documents filed in support of such a motion. *Mack v. South Bay Beer Distribs.*, 798 F.2d 1279, 1282 (9th Cir. 1986). The complaint should not be dismissed for failure to state a claim unless it appears that the plaintiff can prove no set of facts in support of the claim which would entitle plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41 (1957); *Jacobson v. Hughes Aircraft Co.*, 105 F.3d 1288, 1292 (9th Cir. 1997). Thus, a court may properly grant a Rule 12(b)(6) motion if it is clear from the face of the complaint and judicially-noticed documents that Plaintiff cannot prevail as a matter of law.

Facts.

The following factual allegations contained in the Complaint will be taken as true.

From approximately 1990 through 1993, Defendant owned and operated two related entities, International Insurance Underwriters, Inc. ("IIU") and International Insurance Underwriters of Washington, Inc. ("IIUW"). IIU was a licensed insurance broker in the State of California. IIUW was the managing general agent of several non-admitted alien insurance companies selling automobile insurance in California.

On January 25, 1992, Plaintiff was injured in an automobile accident in Oakland, California. The driver of the other automobile, Mr. Moscoso, had previously obtained insurance coverage from Defendant's related companies. Moscoso's policy showed an expiration date of December 6, 1991,[2] and a coverage limit of $35,000.

Plaintiff sued Moscoso in state court for negligence, and on March 4, 1993, he obtained a default judgment against Moscoso in the approximate sum of $45,000. In connection with his efforts to recover against Moscoso's policy, Plaintiff discovered that the insurer was insolvent.

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[2] Plaintiff alleges, and the Court, for purposes of this motion, accepts as true that neither Defendant nor his related entities issued a notification of nonrenewal to Mr. Moscoso as required by California Insurance Code § 1861.03. As a result, the policy was arguably still in effect on the date of the accident. *See* California Insurance Code § 663(c) (coverage is extended as a matter of law upon failure to provide notice of nonrenewal).

On October 22, 1993, Plaintiff filed a state court complaint against Defendant and his related entities, IIU and IIUW. Plaintiff alleged that Defendant intentionally engaged in a fraudulent scheme to sell underfunded insurance policies, arguing that such was in violation of California law.

On January 28, 1997, Defendant filed for Chapter 7 bankruptcy relief. As a result, Defendant was severed from the state court action. The state court action continued and, on April 9, 1997, a judgment was entered in favor of Plaintiff against IIU and IIUW. The state court found that these entities had violated the California Insurance Code by fraudulently marketing insurance policies from under-capitalized, nonadmitted insurance companies, and by intentionally failing to notify the insured of nonrenewal of his policy. The state court held that IIU and IIUW were jointly and severally liable to Plaintiff $32,500[3] for compensatory damages, $85,000 for attorney fees, and prejudgment interest and costs. In addition, the state court held that IIU and IIUW were severally liable to Plaintiff in the amount of $500,000 for punitive damages.

On May 6, 1997, Plaintiff filed this adversary proceeding against Defendant alleging that his claim arose from Defendant's intentionally tortious conduct, and that such is excepted from discharge under 11 U.S.C. §§ 523(a)(2), (a)(4), and (a)(6). Alternatively, Plaintiff claims that the state court judgments entered against IIU

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[3] Representing the policy limit of $35,000 less the partial satisfaction of Plaintiff's claim against the insolvent insurer by the California Insurance Guarantee Association of $2,500.

and IIUW are entitled to collateral estoppel effect under the alter ego doctrine. In addition to a dischargeability determination, Plaintiff requests an award of compensatory and punitive damages, attorney fees and costs, and a jury trial.

On June 6, 1997, Defendant moved under F.R.B.P. 7012 to dismiss the Complaint. Defendant argues that the Complaint is subject to dismissal due to Plaintiff's failure to state any claim upon which relief can be granted.

Given the procedural posture of this case, the Court will assume that Mr. Moscoso did not in fact receive notice of nonrenewal, as Plaintiff alleges, and that coverage existed at the time of the accident, and that Defendant was intentionally engaging in a scheme to defraud the insured by marketing underfunded policies. Under these facts, then, the Court must determine whether a claim would lie against Defendant individually in California state court.

Analysis.

Two of Plaintiff's claims for relief cannot, as a matter of law, be sustained against Defendant, and should be disposed of at this time.

First, Plaintiff maintains a claim for relief under 11 U.S.C. § 523(a)(2)(A). Section 523(a)(2)(A) provides that a bankruptcy discharge will not relieve an individual debtor from any debt "obtained by false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). In order to except a debt from discharge under this provision, Plaintiff must prove: (1) that Defendant made

representations to Plaintiff; (2) that at the time Defendant knew were false; (3) that Defendant made them with the intention of deceiving Plaintiff; (4) that Plaintiff relied on such representations, and; (5) that Plaintiff sustained the alleged loss as the proximate result of the representations. *E.g., In re Apte*, 96 F.3d 1319 (9th Cir. 1996); *In re Baugh*, 97.2 I.B.C.R. 51, 55.

Here, Plaintiff does not allege in his Complaint, nor could he, that Defendant made false representations to Plaintiff. If at all, Defendant made such representations only to Mr. Moscoso. Even if Plaintiff could point to any representations, he has not alleged he relied upon those representations, nor does it appear any fraud was the cause of his loss. Accordingly, the Court concludes that under these circumstances, Defendant's motion to dismiss Plaintiff's claim for relief under 11 U.S.C. § 523(a)(2)(A) should be granted.

Plaintiff also maintains that the allegations set forth in the Complaint assert a claim for relief under 11 U.S.C. § 523(a)(4). The Court disagrees. Section 523(a)(4) excepts a debt from discharge to the extent the debt is obtained by fraud or defalcation while the debtor was acting in a fiduciary capacity as to the claimant. 11 U.S.C. § 523(a)(4). A fraud or defalcation while acting in a fiduciary capacity must involve an express or statutory trust. *In re Littleton*, 942 F.2d 551, 555 (9th Cir. 1991); *In re Baugh*, 97.2 I.B.C.R. 51, 55. In order to satisfy the narrow bankruptcy definition of a fiduciary, an express trust relationship must be found to pre-exist the acts upon which the allegations of fraud or defalcation are based.

Under California insurance law, does a fiduciary relationship exist between the Plaintiff and Defendant here? The parties have not provided the Court, nor can it locate, any support for the proposition that such a fiduciary relationship exists. Although California courts have implied that the relationship between an insurer and the insured is "akin to" a fiduciary one, they have never squarely so held. The California courts have merely characterized the relationship as one holding fidicuary responsibilities, *E.g., New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co.*, 7 Cal.App.4th 1088, 1096, 9 Cal.Rptr. 469, 473 (1992). Moreover, those courts characterizing the duties of an insurer or its agents as fiduciary in nature do so based upon the special nature and purposes inherent in an insurance contract. *Id.* And, most importantly, these fiduciary responsibilities do not extend beyond the terms of the insurance contract *between the insured and the insurer. Id.*

Here, there was no insurance contract between Plaintiff and Defendant or his entities, and the parties do not stand in a fiduciary relationship. Accordingly, the Court concludes there is no legal basis for Plaintiff's claims under Section 523(a)(4), and Defendant's motion to dismiss Plaintiff's claim for relief under that provision should be granted.

Plaintiff contends that the underlying state court judgment entered against IIU and IIUW should be afforded collateral estoppel effect in Defendant's Chapter 7 bankruptcy proceedings. The Supreme Court of California has stated that collateral estoppel precludes relitigation of issues previously adjudicated if: (1) the issues necessarily decided in the previous suit are identical to

the issues sought to be relitigated; (2) there was a final judgment on the merits of the previous suit, and; (3) the party against whom the plea is asserted was a party, or in privity with a party, to the previous suit. *E.g., San Diego County Department of Social Services v. James J.*, 3 Cal.App.4th 984, 993, 46 Cal.Rptr.2d 491, 497 (1995).

In this case, the Court concludes that the first and second elements are satisfied handily. Effective state court judgments have been entered against IIU and IIUW on the grounds that these two entities had willfully violated certain provisions of the California Insurance Code resulting in damage to Plaintiff. There is no showing that IIU and IIUW have taken any action in the state court to set aside the judgments, nor is there anything in the record indicating that the judgments are being appealed. Accordingly, the Court assumes, for purposes of the present motion, that a final judgment has been rendered.[4] In addition, the issues necessarily decided in the previous suit are arguably identical to the issues sought to be relitigated: whether Defendant, on behalf of his companies, engaged in willful and malicious conduct resulting in damages to Plaintiff.

The third element of the collateral estoppel doctrine, that the party against whom the plea is asserted was a party, or in privity with a party, to the previous suit, is

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[4] According to California law, a judgment on appeal is not final for purposes of collateral estoppel. E.g., *National Union Fire Ins. Co. v. Stites Prof. Law Corp.*, 235 Cal.App. 3d 1718, 1 Cal.Rptr.2d 570 (1991). However, a default judgment is afforded collateral estoppel effect. *E.g., Four Star Electric, Inc., v. F & H Construction*, 7 Cal.App.4th 1375, 10 Cal.Rptr.2d 1 (1992).

more problematic. The term "privity" refers to some relationship or connection with the party which makes it proper to hold "privies" bound with the actual parties. "Who are privies requires careful examination into the circumstances of each case as it arises." *Zaragosa v. Craven*, 33 Cal.2d 315, 318, 202 P.2d 73 (1949). The courts have abandoned application of rigid categories in favor of a practical approach which addresses the question of "whether the non-party is sufficiently close to the original case to afford application of the principle of preclusion." *People v. Drinkhouse*, 4 Cal.App.3d 931, 937, 84 Cal.Rptr. 773 (1970). Here, Defendant had filed for bankruptcy and was severed as a party in the state court action prior to entry of any judgment. Because of this, Defendant clearly lacked an incentive to litigate the issues in the state court proceeding given his limited liability. Under these circumstances, the judgment should not therefore be given collateral estoppel effect *as against Defendant* in this action. While the findings and conclusion of the state court may be relevant in this action, they are not binding on Defendant.

Next, Plaintiff maintains that the allegations set forth in the Complaint assert a legally sufficient claim for relief under 11 U.S.C. § 523(A) (6). Plaintiff contends that Defendant, in directing a scheme to defraud policy holders, engaged in intentional, tortious conduct. Defendant maintains that such comes within the ambit of Section 523(a) (6). Further, Plaintiff argues that the doctrine of alter ego applies due to Defendant's purported intentional, tortious conduct, thereby transferring any liability from IIU and IIUW to Defendant personally, making

Defendant personally liable for the indebtedness represented by the state court judgment centered against IIU and IIUW.

Under Section 523(a) (6), an individual debtor will not be discharged from any debt that is the result of "willful and malicious injury . . . to another or the property of another entity." 11 U.S.C. § 523(a) (6). Therefore, in order to assert a valid claim for relief under Section 523(a) (6), Plaintiff must prove by a preponderance of the evidence that the debtor's actions were "willful and malicious." *Grogan v. Garner*, 498 U.S. 279, 291 (1991). The Ninth Circuit has defined "willful and malicious" as "a wrongful act . . . done intentionally, [which] necessarily produces harm and is without just cause or excuse . . . even absent proof of specific intent to injure." *In re Cecchini*, 780 F.2d 1440, 1443 (9th Cir. 1986).

The term "willful" in this context means "deliberate or intentional." *In re Britton*, 950 F.2d 755, 759 (9th Cir. 1991). Thus, a creditor need only show that the debtor acted intentionally. The intent required is intent to do the act at issue, not intent to injure the victim. *In re Britton*, 950 F.2d at 605; *In re Cecchini*, 780 F.2d at 1443.

To prove malice, it is only necessary to show that the debtor committed a wrongful act which necessarily produced harm and was without just cause or excuse. *In re Littleton*, 942 F.2d 551, 554 (9th Cir. 1991). Malice may be inferred from the wrongful act. *Id.* Further, the wrongful act element is construed broadly. *See In re Gee*, 173 B.R. 189, 192-93 (9th Cir. B.A.P. 1994) (finding conduct that

violates state or federal law and which necessarily produces harm wrongful under Section 523(A) (6), particularly conduct infringing upon the rights of others). To satisfy the requirement that the conduct necessarily produced harm, it is sufficient for the creditor to show it was reasonably foreseeable that the debtor's wrongful conduct would result in injury to the creditor. *In re Britton*, 950 F.2d at 605; *In re Littleton*, 942 F.2d at 554.

Here, it was Defendant's entities that are allegedly guilty of wrongful activities. Ordinarily, a corporation is regarded as a legal entity separate and distinct from its stockholders, officers and directors. *Robbins v. Belcher*, 52 Cal.App.4th 886, 892, 60 Cal. Rptr.2d 815, 818 (1997). However, under the alter ego doctrine, when a corporation is employed by an individual to perpetrate fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, a court may disregard the corporate entity and treat the corporation's act as if it were done by the persons actually controlling the corporation. *Hennessey's Tavern, Inc. v. American Air Filter Co., Inc.*, 204 Cal.App.3d 1351, 1358-59, 251 Cal.Rptr. 859, 863 (1988). In general, the two requirements for the alter ego doctrine are that (1) there is such a unity of interest and ownership between the corporation and the individual controlling it that their separate personalities no longer exist, and (2) failure to disregard the corporate entity would sanction a fraud or promote injustice. *Robbins*, 52 Cal.App.4th at 892, 60 Cal. Rptr.2d at 818. The doctrine is applicable where an innocent party attacks the corporate form as to an injury to that party's interests. *Robbins*, 52 Cal.App.4th at 892, 60 Cal. Rptr.2d at 818. The issue is whether, in a particular case, justice and equity can best be accomplished and

fraud and unfairness defeated by disregarding the distinct entity of the corporate form. *Robbins*, 52 Cal.App.4th at 892, 60 Cal.Rptr.2d at 818. A claim against the alter ego defendant is identical with that claimed by the plaintiff against the already-named defendant. *Hennessey's Tavern*, 204 Cal.App.3d at 1359, 251 Cal.Rptr. at 863. The issue of whether the corporate veil should be disregarded may be resolved in a separate proceeding subsequent to the action against the corporate defendant. *Hennessey's Tavern*, 204 Cal.App.3d at 1358, 251 Cal.Rptr. at 863.

Here, the allegations are sufficient to state a potential claim for relief against Defendant as the actor for the wrongful conduct of the entities he allegedly controlled. The Plaintiff alleges that Defendant controlled these insurance agencies, and that he directed and supervised them in the wrongful sale of auto insurance in undercapitalized companies to the public. If proven at trial, these allegations could give rise to a nondischargeable claim by Plaintiff for any damages he suffered as a result of Defendant's arguably willful and malicious conduct. Plaintiff's Section 523(a) (6) claim must therefore proceed to trial, and Defendant's motion to dismiss it should be denied.

Plaintiff also seeks an award of punitive damages, attorney fees and costs, and a determination that such awards would be accepted from discharge.

Although Defendant contends that this Court is without authority to award punitive damages, as the initial trier of fact in this case, the Bankruptcy Court does have the authority to award such damages in connection with the Section 523(a) (6) discharge litigation. *Klaus v.*

Thompson (In re Klaus), 181 B.R. 487, 492 (Bankr.C.D.Cal. 1995) (citing *Devlin v. Kearney Mesa AMC/Jeep/Renault*, 155 Cal.App.3d 381, 388, 202 Cal.Rptr. 204 (1984). State law determines whether punitive damages should be granted. *Sunclipse, Inc. v. Butcher (In re Butcher)*, 200 B.R. 675, 678 (Bankr.C.D.Cal. 1996). California law provides:

> In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

Cal. Civ. Code § 3294(a) (West Supp. 1996).

In this case, the allegations made by Plaintiff concerning Defendant's arguably willful and malicious conduct, if proven at trial, could justify relief under the above statute. Therefore, Plaintiff's claim for an award of punitive damages must proceed to trial, and Defendant's motion to dismiss it should be denied.

The Ninth Circuit, moreover, has held that punitive damages fall within the scope of Section 523(a) (6) as liabilities for willful and malicious injuries that may be excepted from discharge. *Moraes v. Adams (In re Adams)*, 761 F.2d 1422, 1428 (9th Cir. 1985). Since Plaintiff's claim for the award of punitive damages will proceed to trial, it is likewise appropriate that Plaintiff's claim to except such damages from discharge also proceed to trial. Therefore, Defendant's motion to dismiss this claim should be denied.

Concerning Plaintiff's claim for attorney fees and costs, a distinction must be drawn between those attorney fees incurred prepetition in state court, and the attorney fees incurred in litigating this dischargeability claim. As for prepetition attorney fees, the Ninth Circuit Bankruptcy Appellate Panel has applied the "status dependent doctrine" in holding that "[a]ncillary obligations such as attorneys' fees and interest may attache to the primary debt; consequently, their status depends on that of the primary debt." *In re Florida*, 164 B.R. 636, 639 (9th Cir. B.A.P. 1994) (citations omitted). Under this doctrine, if the underlying debt is held nondischargeable under Section 523(a) (6), the attorney fees and costs incurred with relation to the debt are also excepted from discharge. This Court finds that the "status dependent" doctrine is the appropriate standard to be applied to the facts of this case. If at trial Plaintiff can establish that the prepetition debt attributed to Defendant through the alter ego doctrine is excepted from discharge, the Plaintiff will have a claim for the attorney fees incurred prepetition associated with that debt. For this reason, Defendant's motion is denied as to prepetition attorney fees.

With respect to attorney fees incurred in this adversary proceeding, the result is different. When attorney fees are provided for by contract or by state statute, a party may be entitled to such fees in a bankruptcy proceeding. *In re Fobian*, 951 F.2d 1149, 1153 (9th Cir. 1991). "However, where the litigated issues . . . [are] peculiar to federal bankruptcy law, attorney's fees will not be awarded absent bad faith or harassment by the losing party." *Id.* This discharge action is based on federal bankruptcy law. *See* 11 U.S.C. § 523(a) (6). Since there is no

provision providing for attorney fees in actions brought under 523(a) (6), Plaintiff has no legal basis to recover attorney fees in this particular proceeding. Therefore, Defendant's motion to dismiss should be granted with respect to Plaintiff's claim for attorney fees in this adversary proceeding.

Lastly, Plaintiff asserts a right to a trial by jury on his various claims. The determination is made by reference to the two-part test of *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989): "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature." *Id.* at 42 (quoting *Tull v. United States*, 481 U.S. 412, 417-418 (1987). "Actions to determine the nondischargeability of debts fail the second prong of this test because such proceedings are equitable in nature." *American Express Travel Related Services Company Inc. v. Hashemi (In re Hashemi)*, 104 F.3d 1122, 1124 (9th Cir. 1997). Therefore, litigants in bankruptcy have no right to a jury trial under the Seventh Amendment in dischargeability proceedings. Accordingly, Defendant's motion should be granted as to this claim, and this action will proceed to trial before the court sitting without a jury.

Conclusion

For the reasons set forth above, a separate order will be entered which grants Defendant's Motion to Dismiss as to Plaintiff's claims for relief under Sections 523(a) (2) and (a) (4) of the Bankruptcy Code, as to Plaintiff's claim

for attorney fees incurred in this proceeding, as to Plaintiff's claim to the right to a jury trial. Defendant's Motion will be denied as to Plaintiff's claim for relief under Section 523(a) (6), as to Plaintiff's claim for an award, and to except that award from discharge, of punitive damages, and as to Plaintiff's claim for prepetition attorney fees.

DATED This 25th day of August, 1997.

/s/ Jim D. Pappas
JIM D. PAPPAS
CHIEF U. S. BANKRUPTCY JUDGE
DISTRICT OF IDAHO
VISITING JUDGE